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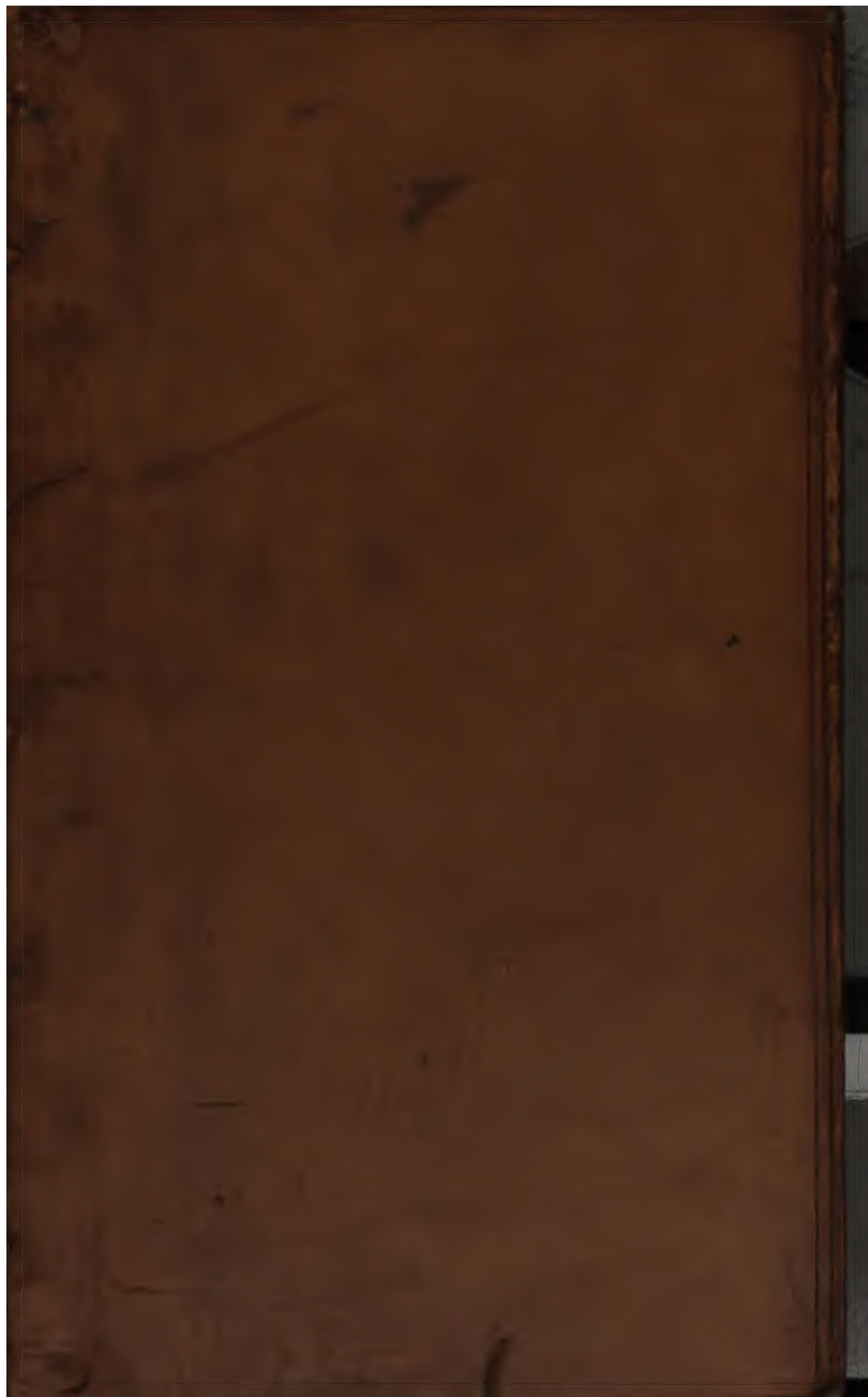
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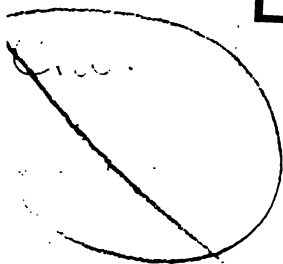


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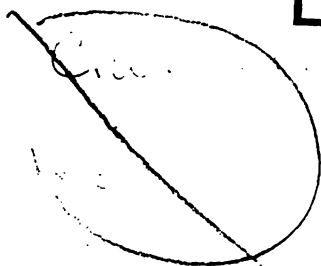


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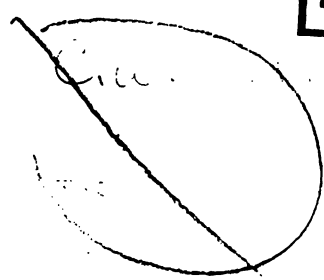
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY
DURING THE TIME OF
LORD CHANCELLOR SUGDEN.

BY
THOMAS JONES AND EDMOND DIGGES LA TOUCHE, ESQRS.,
BARRISTERS AT LAW.

VOL. II.
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The Right Hon. FRANCIS BLACKBURNE, *Master of the Rolls.*

The Right Hon. THOMAS BERRY CUSACK SMITH, *Attorney-General.*

RICHARD WILSON GREENE, Esq., *Solicitor-General.*

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

In Re CATHERINE BARRY, *Petitioner.*

1st Will. IV. c. 60.

1844.

November 16.

MR. BREWSTER, for the petitioner, moved, pursuant to the prayer of the petition, that *Robert Gore Richardson* might convey and assign to the petitioner all the estate or interest which he took or had, as heir-at-law of *William Richardson* deceased, trustee in the will of *Robert Gore*, deceased; and, if necessary, that such deed of conveyance should be settled by one of the Masters; or that a new trustee might be appointed.

The petition set forth that *Robert Gore* was seised of Kilpedder under a lease for lives renewable for ever, and of other lands; and being so seised, made his will, dated the 4th of November, 1823, and thereby devised to *William Richardson* all the estates and property of whatever nature

A petition under the 1 Will. IV., c. 60, stated, that in 1823 the testator devised real estate to a trustee to pay debts; and after payment thereof, in trust for the petitioner; that he died in 1824, and thereupon the petitioner entered: that many years ago, petitioner and the trustee sold part of the estate, and paid all the debts; that the trustee had died, and that his heir was a minor, and it prayed a conveyance

of the legal estate. The Court directed inquiries whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will.

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BARRY.*Statement.*

and description, real, freehold, personal, or mixed, he should be seised of or entitled to, at the time of his death ; upon trust that he should, in the first place, pay all such just debts as the testator might owe at the time of his death ; and after payment thereof, that said *William Richardson*, his heirs, executors, and administrators, according to the nature of each particular estate and interest, should stand seised and possessed of the testator's said estates and property, and receive, pay, and apply the rents, issues, and profits thereof to the sole and proper use and behoof of the petitioner, and to be conveyed, paid, and applied to such uses and purposes as the petitioner should, by deed or will, appoint or direct ; and he appointed the petitioner his executrix.

Robert Gore died in 1824, and the petitioner proved his will. Some of the *cestuis que vie* in the lease of *Kilpedder* having died, it was, in May, 1827, renewed to *William Richardson*, as such trustee, by an indenture made between *Jean Gunn Cunningham*, the lessor, of the first part, the petitioner, of the second part, and *William Richardson*, of the third part.

William Richardson died shortly before the filing of this petition, leaving *Robert Gore Richardson*, his eldest son, and heir-at-law, a minor, of the age of sixteen years, him surviving.

The petitioner and *William Richardson*, several years ago, sold part of the testator's estate, and out of the proceeds thereof, and otherwise, fully paid and satisfied all the just debts of the testator, and other the trusts of his will ; and the petitioner, since the death of the testator, had been in

the sole and exclusive occupation and enjoyment, or in receipt of the rents of the lands remaining unsold.

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Notice of the application was served upon the minor and his mother.

THE LORD CHANCELLOR :—

I feel some difficulty in assuming jurisdiction in this case. What is asked is, in fact, an *ex parte* execution of the trust. I cannot administer the estate upon this petition. If it were the case of a very old trust I should have no difficulty ; but here the trust is barely twenty years old. I think, however, that I may direct an inquiry.

Judgment.

The following order was made :—

Refer it to the Master of this Court, in rotation, to inquire and report whether *Robert Gore Richardson*, in the petition named, is an infant, and a trustee within the meaning of the Act of Parliament, of the 1 Will. IV., c. 60, and whether he is a trustee for the petitioner, *Catherine Barry*, alone, discharged of debts and the trusts of the will of *Robert Gore*, deceased, in the petition named. And after the Master shall have made his report, such further order shall be made as shall be just.

Order.

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NIXON v. ROBINSON.

Nov. 13, 18.

The Court has no authority to set up a lease, which by the *bond fide* exercise of the power vested by law in a tenant for life to grant a new lease, has, by the doctrine of surrender by operation of law, been determined; there being no fraud or collusion, or other circumstance, to justify the interference of the Court.

Those who, with notice of his title, deal with a person entitled to a partial interest in an estate, are responsible for any dealing with the property which professes to encumber and embarrass the estate of the other persons claiming under the same instrument. They are not at liberty to deal with the estate

so as to embarrass the other persons claiming under the same instrument.

An account of rent and mesne rates decreed under circumstances of complexity of title occasioned by the acts of the tenant, and in order to avoid a multiplicity of suits; the bill also seeking the delivery of a deed to be cancelled.

Semble.—That if a demurrer for multifariousness cannot be taken to a bill because it contains a charge of collusion between the several defendants, and the plaintiff fail to prove the collusion, the objection may be taken at the hearing.

ANDREW NIXON being seised of the lands of Fairview, under a lease of the 1st of October, 1799, for three lives (one of whom was still in existence) or thirty-one years, at the yearly rent of 45*l.* 13*s.* 7*d.*, and of 2*l.* 5*s.* 8*d.* receiver's fees, and being indebted to *Thomas Robinson* in the sum of 475*l.*, secured by judgment, by indenture of the 29th of January, 1810, demised the lands to *Thomas Robinson* for the term of the life of the lessee, or for nineteen years, if the lessor's interest should so long continue, at the yearly rent of 100*l.* Irish. Previous to the execution of this lease it was agreed between the parties to it, that *Thomas Robinson* was not to pay to *Andrew Nixon* any portion of the profit rent reserved by the lease until he, by the perception and retention thereof, should be repaid the principal sum of 475*l.*, together with interest at the rate of 6*l.* per cent. on the sum of 400*l.*, part thereof; it having been agreed between them that the residue thereof, amounting to the sum of 75*l.* should not bear interest: and it was further agreed, that *Robinson* should be allowed to deduct from the profit rent, as the same should become payable, the sum of one shilling in the pound, on the profit rent, as receiver's fees. Upon the execution of this lease, *Thomas Robinson* entered into possession, and during the

life-time of *Andrew Nixon*, by the perception of the rents and profits, repaid himself a considerable part of the 475*l*.

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In October, 1834, *Andrew Nixon* died, leaving *William Nixon*, his eldest son by a former marriage, his heir-at-law, and his wife *Janet*, and seven children of his second marriage, him surviving; and by his will, bearing date the 3rd of October, 1834, he devised the lands of Fairview (therein described to be in the occupation of *Thomas Robinson*, under a lease during his life, at the rent of 100*l*. per annum), to his wife, *Janet*, for her life, provided she remained during that time unmarried, and provided she kept the same hereditaments and premises free of all incumbrances; together with all his household goods, monies, debts, and moveable effects whatsoever: but if she married, or laid on any incumbrance as aforesaid, then his will was, that the hereditaments and premises, household goods, monies, debts, and moveables, should go to his children immediately, as thereafter mentioned: and that all his children by his said wife, and *William Nixon*, his son by his former wife (excepting the one she might will to inherit the freehold estate), be left at his wife's decease, or at the time the provisoes were not complied with, share and share alike of all the household goods, monies, debts, and moveable effects whatsoever; howsoever giving her, his said wife, *Janet*, a discretionary power therein: and the testator appointed his wife and *John Hall* executrix and executor of his will.

In September, 1835, *Janet Nixon* alone proved the will.

Thomas Robinson claimed the sum of 53*l*. 17*s*. 4*d*. to be

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due to him at the decease of *Andrew Nixon*, for principal monies, interest, and receiver's fees, up to the 1st of May; and furnished an account to *Janet Nixon*, claiming that sum. In September, 1835, *Robinson* applied to *Janet Nixon* for a reduction of the rent reserved by the lease of 1810, insisting that the rent reserved thereby exceeded the value of the lands; and, after some negotiation between the parties, it was agreed that *Janet Nixon* should grant a new lease of the lands to *Robinson*, at the reduced rent of 64*l.* 9*s.* 10*d.* of the present currency per annum, in consideration of *Robinson* agreeing to give up and forego his claim for receiver's fees, and to pay the balance which, after excluding that demand from the account, should appear to be due by him on foot of the profit rent. A new account was accordingly made out, dated the 17th of October, 1835, whereby it appeared that the sum of 35*l.* 10*s.* 7½*d.* was due by *Robinson* to the representative of *Andrew Nixon*, on account of the profit rent of the land up to the 1st of May, 1834; which sum *Robinson* paid to *Janet Nixon* on the day on which the account was settled, and took from her a receipt for the same, in full for all rent and arrears of rent due out of the lands to her as executrix of *Andrew Nixon*.

Pursuant to this agreement, a lease, dated the 3rd of April, 1836, was executed by *Janet Nixon*, therein described as widow and executrix of *Andrew Nixon*, to *Thomas Robinson*; and thereby she demised the lands to *Robinson* and his heirs, for the life of *William Atkinson* (the surviving *cestui que vie* in the lease of 1799), at the yearly rent of 64*l.* 9*s.* 10*d.*

In July, 1836, *Janet* intermarried with *Thomas Todd*.

By an indenture of the 27th of October, 1842, made upon the marriage of *Francis Locke* and *Mary Robinson*, after reciting the above lease of the 3rd of April, 1836, *Thomas Robinson* granted and conveyed his estate and interest in the lands demised thereby, to trustees, upon trusts for the benefit of *Francis Locke* and his intended wife, and the issue of their marriage.

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Upon the 28th of April, 1843, a bill was filed by the children of *Andrew Nixon* against *Thomas Robinson*, *Francis Locke*, *Thomas Todd* and *Janet* his wife, charging collusion between *Robinson* and *Janet Nixon* to defeat the rights of the children of *Andrew Nixon* to the rent reserved by the lease of 1810; and praying that the trusts of the will of *Andrew Nixon* might be carried into execution, and that the rights of the plaintiffs, under the same, might be declared; and that an account might be taken of the sums due and owing by *Thomas Robinson* to the plaintiffs, and also by *Thomas Todd* and *Janet*, his wife, after all just credits and allowances; and that the lease made by *Janet* to *Robinson*, and the transfer or assignment from *Robinson* to *Locke* might be declared fraudulent and void as against the plaintiffs; and that the defendants might be directed to bring same into Court to be cancelled; and that *Thomas Robinson* might be charged with the rent of 100*l.* Irish a year, being the rent reserved by the lease of the 29th of January, 1810, from the time of the marriage of *Janet*; or that an occupation rent might be set upon said lands and premises, and *Thomas Robinson* charged therewith; and *Francis Locke* with a like rent from the period of such transfer or assignment: and that *Francis Locke* might be decreed to bring into Court, for the use of plaintiffs, the difference between such rent of

1844. 100*l.* per annum, or such occupation rent, and the head rent payable in respect of such lands, from the time of the marriage of *Janet* with *Todd*; and that what should be found due on such account should be secured for the benefit of all parties interested therein.

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The defendant, *Robinson*, denied that he had any notice at the time of the execution of the lease of 1836, that *Janet Nixon* contemplated marrying again; but admitted that he had notice of the will of the testator at the time that he accepted the lease of 1836: and he submitted, that as he never in any way interfered with the assets of *Andrew Nixon*, he ought not to have been made a party to the bill; and that not having been in any way concerned or connected with the settlement of the accounts relating to the testator's estate, he ought not to be involved in any litigation respecting the same. He also submitted several matters of law, as to which he had been interrogated by the bill, to the consideration of the Court.

The defendant, *Locke*, denied notice of the title of the plaintiffs, or of the will of the testator.

Argument. Mr. *William Brooke*, Mr. *A. Gayer*, and Mr. *B. Lloyd*, for the plaintiffs.

The only question is, whether this Court has jurisdiction to give relief in this case. The objection that the bill is multifarious should be taken by demurrer; it is too late to make it at the hearing; *Wynne v. Callander*(a); *Ward v. Cooke*(b); *Cashell v. Kelly*(c); *Raffety v. King*(d). It will be argued that the remedy of the plaintiff is at law;

(a) 1 Russ. 293.

(b) 5 Madd. 122.

(c) 2 Dru. & War. 181.

(d) 1 Keen. 601.

but first, this is a case in which the defendants have, by their acts, complicated the title of the plaintiffs to relief; and all their demands against the defendants could not be included in one action at law: therefore, on the ground of complication of title, and to avoid multiplicity of suits, the Court has jurisdiction; *Trant v. Bury(a)*; *Kennington v. Houghton(b)*. In *Kennington v. Houghton* it was held that the submission of the defendant to account gave the Court jurisdiction; and that circumstance exists in the present case. The plaintiffs are also entitled to have the lease of 1836 delivered up to be cancelled; and may maintain the bill on that ground.

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Mr. Ross Moore for the defendant *Robinson*.

The case of fraudulent collusion made by the bill is unsupported by evidence. The remedy here was wholly at law. The acceptance of the lease of 1836 was a surrender in law of the lease of 1810; Co. Litt. 337 b: even though the second lease were voidable; Shep. Touch, 301: and this doctrine applies equally to freehold leases; to leases for terms of years, *Lessee of Lynch v. Lynch(c)*; and to the case where the lessor in the second lease has only a defeasible estate; *Roe d. Berkeley v. The Archbishop of York(d)*; *Davison v. Stanley(e)*. There was therefore nothing to prevent the plaintiffs maintaining an ejectment on the title for the recovery of the lands. The bill is sought to be maintained on several grounds. There is not such a complication of title or accounts in this case as there was in *Kennington v. Houghton*, or even in *Trant v. Bury*;

(a) Ll. & Gould. Tem. Sug. 78. (d) 6 East. 86.

(b) 2 Y. & C., C. C. 620. (e) 4 Burr. 2210.

(c) 6 Ir. Law. R. 131

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and in the latter case, the bill was maintainable on the ground that it was filed against the representatives of the lessee for an account of his assets. The alleged multiplicity of suits arises from the necessity of bringing two actions for meane rates; and as to the submissions in the answer, they are the formal conclusions of the defendant to matters of law charged in the bill. They differ from the submission in *Kennington v. Houghton*, which was a submission to have the account sought by the bill taken. An admission of a fact cannot be withdrawn; but an admission of law may; *Pearce v. Grove*(a). The objection that the bill is multifarious is open to the defendant on this hearing. The cases which have been cited only establish, that when the objection can be taken by demurrer, it must be raised in that manner. Here it could not; for the plaintiffs, by their bill, charged collusion between *Robinson* and *Janet Todd*; *Ryan v. Roche*(b); *Alsayer v. Rowley*(c); and there is no case deciding that such an objection must be taken by plea. *Keogh v. Keogh*(d), and *Pultney v. Warren*(e), were also referred to.

Mr. *Nelson* for *Locke*, cited *Greenwood v. Churchill*(f) and *Salvidge v. Hyde*(g) on the question of multifariousness.

Mr. *A. Gayer*, in reply.

(a) 3 Atk. 522.

(b) 2 Moll. 437.

(c) 6 Ves. 748.

(d) 2 Moll. 91.

(e) 6 Ves. 72.

(f) 1 M. & K. 546.

(g) 1 Jac. 151.

THE LORD CHANCELLOR:—

This would be a case of great importance if I were called upon to decide the points made in the course of the argument. The testator, being entitled under a lease for lives to certain lands, in 1810, granted a lease of them for the life of the defendant *Thomas Robinson*, at the rent of 100*l.* per annum; and he being at that time indebted to the lessee in the sum of 475*l.*, it was by a collateral agreement between them, arranged that the lessee should, after payment of the head rent, retain the remainder of the reserved rent, in order, by the perception thereof, to repay himself the 475*l.* and interest. Therefore, upon the execution of the lease, the lessee filled the mixed character of mortgagee and lessee. The lessor died: by his will he devised the estate in question to his wife, for her life, provided she should continue unmarried; and after her death or marriage to his children. The widow married again; but before her second marriage she made a new lease of the lands to Mr. *Robinson* (who had full notice of her title to the estate), for the life of the then surviving *cestui que vie* in the lease of 1810, at a reduced rent; and a receipt has been proved, *vivâ voce*, from which it appears that previously to the execution of the lease, the widow, who was tenant for life and executrix, settled an account with the lessee; by which, in consideration of the new lease granted to him, the lessee relinquished certain claims to receiver's fees to which he supposed himself entitled, and paid to the executrix the balance of the account; which closed the transaction as to the mortgage. So that the relation of mortgagee and lessee, under the original dealing, had ceased before the filing of the bill; but it is not stated on the pleadings that such was the case; and in fact the receipt

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now relied upon was not ready to be proved at the hearing of the cause; and it was only by the indulgence of the Court that it has been proved. Mr. *Robinson*, the lessee, after having been in possession of the lands for some years, upon the marriage of his daughter, assigned the lease to his son-in-law, Mr. *Locke*; and though Mr. *Robinson* admits that he was aware of the nature of the widow's title when she made the lease to him, yet Mr. *Locke* denies that he knew anything of it until after the assignment; and he claims to be a purchaser for valuable consideration. It has been insisted upon by the plaintiffs, who are the children of the testator, that, in consequence of their mother having married again, they are entitled in possession to the property, subject to the lease, if a valid one; and they contend, first, that this transaction was a mere fraud upon their rights: and although both parties have argued that the new lease was a surrender of the old one—which it was—yet it is contended by the plaintiffs that they have an equity in this Court to set up the original lease; inasmuch as the tenant for life had no right, as against the remainder-men, to accept a surrender of the lease of 1810. As an abstract proposition, I cannot conceive a question of greater importance: whether a surrender by operation of law, by reason of the acceptance of a new lease from a person having a partial interest in the reversion, can, though valid at law, be impeached in this Court. This is a case which must have often occurred. Tenants for life have frequently made leases, which, though invalid as against the remainder-men, operated as surrenders in law of former leases. I therefore called for some authority upon this point, which, I believe, is now made for the first time. If a person has an estate enabling him to do an act which may be beneficial or prejudicial to the property, I do not know that this Court

has jurisdiction to annul the legal consequences of his act, done by virtue of that estate. It does not follow that a surrender accepted by a tenant for life is injurious to the estate; it may be a provident act; or, on the other hand, it may be an injurious act to give up a lease on which a large rent is reserved, payable by a solvent tenant, and so destroy the interest of the remainder-man. I can hardly suppose a case in which the surrender would operate thus injuriously, in which fraud or collusion would not appear. As to the general jurisdiction of the Court in such cases, I do not think that I have authority to set up a lease, which, by the *bonâ fide* exercise of the power vested by law in the tenant for life to grant a new lease, has, by the doctrine of surrender by operation of law, been determined; there being no fraud or collusion, or other circumstance to justify the interference of the Court. I am of opinion, therefore, that this ground of relief cannot be maintained, and I shall not assume the jurisdiction without express authority.

Then as to the other relief prayed by the bill. First, it is said, that there is so much difficulty and complication as to the remedy of the children under the new lease, and the assignment of it, that I have jurisdiction to give relief in order to prevent circuitry or multiplicity of actions. There is no doubt that this Court has jurisdiction to grant relief upon that ground, if the case be made out: and though the remedy would, *primâ facie*, be at law, yet if it could be shown that it would be necessary to bring several actions to establish the right, or that there was much difficulty as to the mode of proceeding at law, these circumstances would, in certain cases, justify the Court in assuming jurisdiction. Here the tenant for life did an improper

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act in granting the new lease ; not in granting the lease if it had been confined to her own life, but in assuming to bind the lands by an absolute lease for the life of the *cestui que vie*, although her interest only enabled her to grant a lease for her own widowhood. The consequence of this is, that Mr. *Robinson*, who originally was mortgagee as well as lessee, but whose first character has ceased by a dealing with the tenant for life, whom he knew to be such, has complicated considerably the title of the remainder-men. The lease was assigned to *Locke*, not as a lease for the life of the widow, but as an absolute lease for the life of the lessee ; and the assignee now sets up his title to it as a purchaser for valuable consideration, without notice ; insisting upon his right to the whole term purported to be demised. It is manifest, therefore, that the original lessee has acted improperly in concurring with the tenant for life in the making of this lease ; which, upon the face of it, imposes on the estate an interest greater than that which, within the knowledge of both of them (although that knowledge was not communicated to others on the face of the instrument), she had a right to grant, or he to accept. They have complicated the title, and imposed on the children the difficulty of contesting their title with Mr. *Locke*.

Mr. *Robinson* admits that he was aware of the title of the tenant for life at the time of the grant of the new lease. Mr. *Locke* says that he had not any notice of her title ; but he clearly had notice of it in the view of this Court, because in the lease under which he now claims, the lessor is stated to be executrix and widow named in the will of *Alexander Nixon*, the original lessor. This, therefore, fixes *Locke* with notice of the will ; and when I turn to the will, I find that this property is devised to the widow

as being in the possession of *Robinson* as lessee, at the yearly rent of 100*l.*; and this fixes *Locke* with notice of the previous tenancy. Therefore he was bound to inquire into the circumstances connected with the original holding; and if he had done so, he would have known that the original lease had been properly granted; and if surrendered, that it had been so by virtue of a dealing with the tenant for life, who had no power to grant the lease she purported to give. I shall always hold those who deal with a person entitled to a partial interest in an estate, responsible for any dealing with the property, which professes to encumber and embarrass the estate of the other persons claiming under the same instrument with the grantor. They are not at liberty to deal with it so as to embarrass the persons claiming under the same instrument. Considering the original relation between the parties, that of mortgagee and lessee, and considering the abuse of taking the lease for an absolute term, and the use to which the lessee has applied that lease in assigning it to his son-in-law upon his marriage, as a lease for an absolute term, I think that this Court has jurisdiction to give relief to the plaintiffs. For what would be the remedy of the plaintiffs at law? They might bring an ejectment: but that would not give them possession of the lease. They would be obliged to institute a suit in equity in order to have the lease delivered up to be cancelled. Also two actions at law would be necessary for the recovery of the mesne rates; one against Mr. *Robinson* and the other against Mr. *Locke*, for the times they were in possession of the lands: and if this bill be not maintainable on the grounds I have mentioned, it is upon the ground that the plaintiff is entitled to a decree for the delivery up of the second lease, and to an account on foot of an occupation rent from the time of the marriage of the

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—
Judgment.

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Judgment.

widow ; and there must be an inquiry when that marriage took place.

Upon the frame of the pleadings I would observe, that it is difficult to maintain the point argued by the counsel for the defendant ; for there is not a distinct statement in the answer that the bill is multifarious. I am not prepared to say that if a bill be so framed that the defendant cannot demur to it, he is bound to plead to it : but in this case that question does not arise : the objection that the bill is multifarious is not insisted on in such a way as to entitle the defendant to rely on it at the hearing ; and even if it were, as I am of opinion that the plaintiff is entitled to relief, on the grounds I have mentioned, that removes the objection.

November 25.

The costs of redocketing a recent judgment not allowed in a petition matter.

MACKEN, *Petitioner*, NEWCOMEN, *Respondent*.

PETITION by a judgment creditor for the appointment of a receiver. The petition set forth that the judgment had been recovered in Hilary Term, 1844 : and, in addition to the principal money and interest due on foot of it, the petitioner claimed the sum of 1*l*. for the costs of redocketing the judgment.

The petition had been directed to be moved before the Lord Chancellor.

Mr. *Hughes*, for the petitioner.

Mr. *George* and Mr. *O'Hagan* for the respondent.

THE LORD CHANCELLOR:—

I directed this petition to be moved before me, because I perceived that the petitioner asked for 1*l*., for the costs of redocketing the judgment. Where was the necessity of doing that? I must strike out that sum. The costs of redocketing a judgment, where that proceeding is unnecessary, should not be allowed. Let the sum of 1*l*. be disallowed.

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Judgment.

CUFFE v. YOUNG.

BY indenture of settlement of the 12th of October, 1793, executed upon the marriage of *Wheeler Barrington* with *Eleanor Mary O'Neill*, the lands of Moneybane and Leitrim, chattel interests, the property of *Eleanor Mary O'Neill*, were, with other lands, conveyed to trustees; upon trust (subject to a jointure, payable to *Charlotte O'Neill*, and to an annuity payable to the separate use of *Eleanor Mary O'Neill*, during the joint lives of her and her intended husband), to permit *Wheeler Barrington* to receive the rents thereof during the joint lives of himself and *Eleanor Mary O'Neill*; and after the death of either, in trust for the survivor during his or her life; and after the death of the survivor, upon trust to convey the said lands unto the children of the marriage, if more than one, as tenants in common; and if but one child, to such only child, for the residue of the respective terms of years therein.

November 26.

A creditor instituted a suit against the real and personal representatives of the principal debtor, and against one of the sureties, omitting the other surety; and obtained a decree to account. He afterwards filed a supplemental bill against the representatives of the other surety; but inasmuch as they did not derive any benefit from the proceedings in the original suit, and as the creditor might have framed his original suit so as to have had in it the relief sought by

the supplemental bill:—*Held*, that the plaintiff was not entitled, as against the representatives of the second surety, to the costs of the original suit.

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—
Statement.

There was issue of that marriage one daughter only, namely, *Charlotte Maria Barrington*, who afterwards married *William Palliser Nolan*; and, having survived him, died intestate, leaving three children, *Wheeler Nolan*, *Fitzwilliam Nolan*, and *Charlotte Nolan*, her surviving.

In 1819, *Wheeler Barrington*, *Charlotte Maria Nolan*, then *Charlotte Maria Barrington*, and *Eleanor Mary Barrington*, the wife of *Wheeler Barrington*, executed to *Henry Cuffe* their joint bond and warrant of attorney; upon which a joint judgment was afterwards, in Easter Term, 1837, entered against all the conusors. The money secured by the bond was the proper debt of *Wheeler Barrington*.

Wheeler Barrington having survived his daughter, *Charlotte Maria Nolan*, died in January, 1837; and in January, 1838, *William Cuffe*, the administrator of *Henry Cuffe*, filed an original bill against *Eleanor Mary Barrington*, the widow and personal representative of *Wheeler Barrington*, and *Wheeler Nolan*, a minor, his heir-at-law; praying the usual accounts of the real and personal estate of *Wheeler Barrington*, and that said estate might be applied in a due course of administration: and that if same were not sufficient for the payment of the plaintiff's demand, that an account might be taken of the separate estate of *Eleanor Mary Barrington*; and for payment thereof.

Eleanor Mary Barrington, by her answer, set forth the limitations in the settlement of 1793; and submitted that the plaintiff was not entitled to relief as against her separate estate. At the hearing, the bill, as to that portion of the relief prayed, was dismissed: and the usual accounts of the real and personal estate of *Wheeler Barrington* were directed.

In proceeding under this decree, it appeared that the real and personal estate of *Wheeler Barrington* would not be sufficient for payment of the plaintiff's demand; and the suit having become abated by the deaths of both of the defendants, the plaintiff, on the 10th of March, 1842, filed a supplemental bill and bill of revivor, against the personal representatives of *Wheeler Barrington*, *Eleanor Mary Barrington*, and *Charlotte Maria Nolan*; and also against *Fitzwilliam Nolan*, and his sister, *Charlotte Nolan*, minors; which *Fitzwilliam Nolan* was the brother and heir-at-law of *Wheeler Nolan*, and also heir-at-law of *Wheeler Barrington* and *Charlotte Maria Nolan*; and also against the representatives of the surviving trustee in the settlement of 1793, charging, that in the events which had happened, *Charlotte Maria Nolan* became absolutely entitled to the chattel interests in the lands of *Moneybane* and *Leitrim*; and that the same were subject to her debts; and praying that the original suit might be revived; and that an account might, if necessary, be taken of the personal estate of *Eleanor Mary Barrington*; and also an account of the debts due by *Charlotte Maria Nolan* at the time of her decease, and of her personal estate; and that same might be applied in a due course of administration; and that in case same should be insufficient for payment of such debts, that an account might be taken of her real and freehold estates; and that same might be sold, and the plaintiff and the other creditors of *Charlotte Maria Nolan* paid thereout.

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In this supplemental suit it was decreed that the accounts directed to be taken by the decree in the original suit should be carried on: and also that an account should be taken of the real and personal estate of *Charlotte Maria Nolan*.

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Argument.

The accounts having been taken, and a large sum reported due to the plaintiff, the cause now came on to be heard on report and merits.

Mr. *Brooke*, for the plaintiff, insisted that he was entitled to be paid the costs of the original suit out of the estate of *Charlotte Maria Nolan*; and cited *Reily v. Murphy*(a), and the decrees in *Beckett v. Micklethwaite*(b), and *Green-side v. Benson*(c).

Mr. *B. Lloyd*, for the personal representative and children of *Charlotte Maria Nolan*.

Judgment.

THE LORD CHANCELLOR :—

This case hardly involves the general question. The representatives of the surety, who had property, might have been made defendants to the original suit, in respect of it. Instead of doing so, the plaintiff passed them by, and proceeded against the property of the principal debtor, and of another surety. He then filed this supplemental bill against the representatives of the surety: which, as to them, is an original bill. They were not bound by the accounts taken in the original suit; and as they were minors, it was necessary that the accounts should be again taken as against them. They have not derived any benefit from the former suit; and are, therefore, I think, only bound to pay the costs of the suit to which they have been made defendants.

(a) 6 Mod. 199.

(c) Sau. & Sc. 479.

(b) 3 Atk. 248.

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HATCHELL v. SUTTON.

Nov. 14. 25.

December 2.

UNDER a decree to account, made in a suit instituted to administer the real and personal assets of *Cæsar Sutton*, deceased, the Master reported that, in 1828, *Martin Day* obtained a joint judgment against *Sutton* and one *Pigott*, upon a joint and several bond executed by them ; and that *Pigott* was the principal debtor, and *Sutton* a surety only. *Pigott* was living ; he was a party to the suit merely as a trustee, having the legal estate in some of the lands mentioned in the bill vested in him. He had suffered the bill to be taken as confessed against him.

A joint judgment against two cannot be proved under a decree to account in a suit instituted to administer the real assets of the conusor who died first ; the surviving conusor not being a party to the suit as such. The case does not fall within the 28th General Rule of March, 1843.

Under these circumstances, the Master submitted to the Court, whether *Martin Day* was entitled to prove his demand under the decree in the cause.

Mr. *Glascott* and Mr. *Otway*, for *Martin Day*.

Argument.

Though a joint judgment survives, as to personalty, it is otherwise as respects real estate ; and if one of the conusors die, the plaintiff may proceed to execution against the estate of the deceased^(a). The creditor may therefore file a charge, and obtain a report and decree for payment of his demand in a suit to administer the assets of the party dying first.

Mr. *Brewster* for the representatives of *Cæsar Sutton*.

At law, the creditor cannot sue the heir and terre-tenat

(a) 2 Wm. Saund. 51.

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of the party dying first, without joining the survivor in the suit^(a); and he ought not to have a more extended relief in equity. Here the principal debtor is not a party to the suit as such.

Judgment. THE LORD CHANCELLOR :—

I do not recollect any case like the present; and I must have an authority for doing what I am now asked,—to allow this person to prove his demand against the estate of the deceased, the surety. The judgment being joint, the creditor might, at law, have proceeded against the surviving conusor and the heir and terre-tenants of the deceased; but here he desires to come in under the decree for the administration of the assets of the surety, the principal debtor not being a party to the suit as such. To do so would be to give him a remedy in this Court far beyond his legal right; and the legal right is the measure of his equity. If no authority in equity for the creditor can be cited, I must leave him to file his bill. The only authority referred to is one at law, which states that the survivor must be a party to the writ against the heir of the deceased conusor. Here the party applies for payment of his demand out of the estate of the surety, in the absence of the principal debtor. Could the creditor file a bill on foot of this judgment against the surety without bringing the principal debtor before the Court? I must, if no authority be cited, rule the special point against the creditor. I only decide that the creditor has not a right to be paid his demand in this suit.

(a) 2 Wm. Saund. 51.

The case was again mentioned.

Mr. *Glascott* and Mr. *Otway* urged that the case came within the operation of the twenty-eighth General Rule of the 27th of March, 1843; that it being established that the creditor might, at law, obtain judgment against the survivor and the heir and terre-tenants of the deceased, and, consequently, sue out execution against either, the demand was, in contemplation of a Court of Equity, a joint and several demand.

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Mr. *Brewster*.—The creditor has not proceeded at law to obtain judgment against the survivor and the heir and terre-tenants of the deceased: he has chosen to found his demand upon the judgment, which is joint, and therefore the case is not within the rule.

THE LORD CHANCELLOR :—

Judgment.

This is the case of a joint and several bond given by a principal and a surety, and a joint judgment entered upon it against both. The creditor now seeks to prove his demand against the real estate of the surety, under a decree in a suit which relates only to the assets of the surety, and to which the principal is not a party. The 28th General Rule of 1843 gives to a person having a joint and several demand against several persons, liberty to proceed against any one of them without bringing the others before the Court. But this is a joint judgment; and though there is process at law in such a case to obtain payment out of the estate of the deceased, yet the survivor must be made a party to the action, in order that there may be contribution. That is not de-

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nied. It therefore appears to me that this is not a case in which the creditor can proceed against the estate of the surety alone. But I must take care that the assets are not distributed so as to destroy the remedy of the creditor against the estate of the surety.

It was proposed that the assets should not be distributed without notice to the creditor ; and an order was made accordingly.

Nov. 18, 19,
 20, 21.
 Dec. 2.

TAYLOR v. HUGHES.

A joint stock
 Banking Com-
 pany stopped
 payment. Cer-
 tain of the
 shareholders,
 who afterwards
 obtained the
 management of

IN the year 1834, the Agricultural and Commercial Bank of Ireland, consisting of branch banks in various parts of Ireland with a central office in Dublin, was established, in pursuance of an Act of Parliament. The shareholders, who afterwards obtained the management of the affairs of the Company, contributed, in proportion to the number of shares held by them, to a common fund, which was to be applied for the protection of the contributors, in payment of the debts of the Bank ; and they called on all the shareholders to contribute to this fund. Some did not ; and, for the purpose of carrying out the object of the contributors, an arrangement was entered into between them and a creditor of the Company, that the creditor should obtain a judgment against the Company, to be used against such of the shareholders as the contributors should select. Accordingly, a creditor obtained a judgment by confession against the public officer, and, at the instance of the contributors, issued a *scire facias* against the plaintiff, who had been a shareholder, but, before the contract upon which the judgment had been obtained was entered into, had, by informal transfers, assigned his shares to a trustee for the Company. This transaction is fraudulent, in the view of a Court of Equity :—and the creditor was restrained proceeding at law against the plaintiff.

The 6 Geo. IV., c. 42, does not prevent or interfere with the *bond fide* retirement from the co-partnership of any member ; and the Company may buy out a partner notwithstanding the Act.

Where a transfer of shares is made by a member to the Company, the latter may, as between the parties to the transfer, dispense with the machinery which the Legislature has rendered necessary to transfers in general ; and the Company cannot afterwards, as between themselves and the partner with whom they contracted, impeach the transaction.

Semble, 1. That a person who, *de facto*, is a partner, and who appears to be so on the books of the co-partnership, and whose name is registered as such, cannot discharge himself of his liability to creditors by showing that the transfer to him was informally executed.

2. That the registry of the name of the plaintiff, after the Bank had stopped payment, as a partner “ concerned in the co-partnership, as the same appears on the books of the Company,” was not authorized by the Act, even at law ; where he had ceased to appear as a partner on the books for seven years, and his name had been withdrawn from the register, and no new contract had been entered into with him, but entries merely had been made that the transfers by him were invalid.

suance and under the regulations of the 6 Geo. IV. c. 42, and 1 Will. IV., c. 32. The capital stock of the Bank was divided into shares, payable by instalments. The Irish shares were, for the most part, of the amount of 5*l.* each, payable by instalments of 1*l.* each. Many persons became members of the Company. In March, 1835, proposals were published by the Bank for a person to fill the office of cashier in Dublin; and it was required by those proposals that the person to be appointed should deposit 2000*l.* in the establishment, on which he was to receive interest; part of which was to be appropriated to the purchase of 300 shares (on which the first instalment only was then payable); and the person to be appointed was to receive a salary of 200*l.* per year for his services. The plaintiff, *Despard Taylor*, having complied with the terms of the proposal, was appointed cashier; the duties of which office he continued to discharge until the 31st of May, 1836, when he was elected one of the Board of Directors or Consulting Committee, who, in conjunction with *James Dwyer*, the managing Director, conducted the affairs of the Bank. At this time, in consequence of the very great irregularity with which the books of the Company were kept, the affairs of the Bank appeared, and were believed to be, in a very flourishing state; and, at a meeting of the shareholders, on the 17th of October, 1836, a statement of accounts was submitted, whereby it appeared that the amount of paid-up capital was 375,029*l.*, and of private deposits, 366,182*l.* Shortly afterwards, on the 14th of November, 1836, in consequence of a panic, and of a sudden demand for large sums of money, made on the Agricultural and Commercial Bank by the Provincial Bank and the Bank of Ireland, the Agricultural Bank suspended payments; and, upon the 17th of the same month, the Board

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of Directors passed a resolution, which was entered on the minute book of their proceedings, "That no transfer of stock be sanctioned by the Board until the resumption of business by the Company;" which resolution was not at any time afterwards altered or rescinded. Mr. *Taylor*, in conjunction with his co-directors and others, exerted himself to procure funds to discharge the pressing liabilities of the Bank. In consequence of those exertions, and by means of the directors pledging the assets of the Bank, and personally guaranteeing their payment, the immediate pressure on the Company was removed, and the credit of the Bank, in some degree, restored. Mr. *Dwyer*, and some of the shareholders, then became desirous that the business of the Bank should be resumed; to which others of the shareholders objected. Before the 16th of October, 1837, some steps were taken by the Directors towards the resumption of business, from which it did not appear that Mr. *Taylor* dissented; and on that day, at the half-yearly meeting of the Company, a resolution was adopted by the majority of the shareholders, that the business of the Bank should be resumed; in consequence of which Mr. *Taylor*, as he alleged, resolved to withdraw from the Company, and to discontinue his connexion therewith. On the 6th of November, 1837, he ceased to be a director of the Company.

There were two classes of shares standing in the books of the Company in the name of Mr. *Taylor*, which were the subject of different consideration in this suit. The first class consisted of 1100 shares, and the dealings with respect to them were the following: Upon the 24th of March, 1835, Mr. *Taylor* became the purchaser of 300 of those shares, as before mentioned: and on the 11th of August, 1836,

he became the purchaser of 150 other shares. On the 22nd of April, 1837, *A. C. Chadwick*, in consideration of the sum of 30*l.*, transferred to the plaintiff 300 other shares, upon which one instalment only had been paid up ; and the same were entered in the stock ledger of the Company, pursuant to an order in the handwriting of Mr. *Taylor*, and signed by three of the Directors, as reduced or made equivalent to 150 shares, upon which two instalments had been paid ; and on the 22nd of September, 1837, 500 other shares were transferred to Mr. *Taylor* by Mr. *Hime*, under the circumstances after mentioned.

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The other class consisted of 3000 shares, and was thus circumstanced. The Directors, for the purpose of selling the shares of the Company, and thereby extending the proprietary, in the months of March and April, 1836, allotted about 20,000 shares amongst themselves and others of the officers of the Company, to be disposed of by them for the benefit of the Bank ; and the transaction took this shape : The director or officer made a written application for shares to the Board of Directors, who acceded to it ; and thereupon the number of shares applied for was allotted, in the books of the Company, to the party applying, who accepted a bill as a security for the amount of the shares so allotted to him, at par, and one shilling per share, in addition, which was called outfit : the person to whom the shares were so allotted then disposed of them in the market, and any profit which he could make on the transaction was to belong to him, as a remuneration for his trouble. Accordingly, on the 4th of April, 1836, the plaintiff, then being the cashier of the Bank, made a written application to the manager for 3000 shares of the stock ; and the Board of Directors having acceded thereto, the stock was allotted

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to him; and, on the 15th of April, 1836, the plaintiff accepted a bill (entitled in the books of the Company No. 516), at twelve months, for 3150*l.*, being the amount of the value of 3000 shares at par, and outfit. The dealing with these 3000 shares appeared, from entries in the cash and other books of the Company. The plaintiff transferred 500 of them to *J. R. Hime*, on the 15th of April, 1836; 500 of them to *Peter Jones*, on the 19th of April, 1836; 100 of them to *Mr. Currie*, on the 21st of April, 1836, and 100 of them to *Henry Campion*, on the same day. The application by *Peter Jones* was made by him to the Directors; but, when approved of by them, the shares were transferred to him by *Mr. Taylor*, and not directly out of the stock of the Company. All the shares were sold by *Mr. Taylor* at 1*l.* 6*s.* per share; and in June, 1836, he accounted with the Bank for the 3000 shares, and paid them 1260*l.*, being the amount of 1200 shares, at par and outfit, retaining the profits on the sales of the shares for his own benefit; and an entry was made in the cash book of the Company, under date of the 4th of June, 1836, not according to the real nature of the transaction, but as if the 3000 shares had been repurchased from *Mr. Taylor* by the Company, they returning to *Mr. Taylor* his bill for 3150*l.* The bill was, in fact, given up to *Mr. Taylor*; but no transfer of the 1800 shares, residue of the 3000 shares, was ever actually made by *Mr. Taylor* to the Company. The account, however, which had been opened in the ledger with *Mr. Taylor*, on foot of the 3000 shares (and which was distinct from that opened with him on foot of the other shares), was balanced by an entry of 3000 shares repurchased from him by the Company.

After the Bank had stopped payment, in November,

1836, Mr. *Hime* commenced an action against Mr. *Taylor* to recover damages for alleged misrepresentations in the matter of the sale of the 500 shares to him : and Mr. *Taylor*, in order, as he alleged, to prevent disclosures of the affairs of the Bank, accepted a transfer of these 500 shares, at par, from Mr. *Hime*, as before mentioned.

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In March, 1837, the Bank desired to raise money upon a bill of Mr. *J. R. Pim*, and it was proposed that Mr. *Taylor* should discount it : this he agreed to do, provided the Bank would accept a transfer of 450 of the shares belonging to him, at the price he had paid for the same, he alleging that 300 of the shares had been purchased by him to qualify himself to become cashier ; and the directors having assented to that offer, an indenture of the 3rd of March, 1837, was executed between *Despard Taylor*, of the one part, and *William Hodges*, *Philip Jones*, and *John Chambers*, “ trustees acting for and on behalf of the Agricultural and Commercial Bank of Ireland, under and by virtue, or in execution of the trusts and powers contained in an indenture or deed of settlement, dated on or about the 10th day of August, 1836,” of the other part ; whereby, in consideration of the sum of 450*l.*, *Despard Taylor* assigned to the parties of the second part 450 shares of and in the capital stock and funds of the bank. This deed was executed by Mr. *Taylor* only ; and did not purport to have been approved of by any of the directors for the time being. Under the same date entries were made in the cash-book and stock-ledger of the Company, stating the re-purchase of the 450 shares from Mr. *Taylor* at the price of 450*l.*

In September, 1837, the Bank entered into another negotiation with Mr. *Taylor* for the discount of 3000*l.*, on

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the security of certain bills of exchange then in the Bank. The following entry, taken from the minute-book of the Board of Directors, under the date of the 28th of September, 1837, will explain the nature of the transaction : “ The Committee of Correspondence communicated to the Board that it would be very serviceable to the Company’s interests to obtain a discount of the Company’s bills to the amount of, say 3000*l.*, so as to liquidate some claims which had been authenticated ; and that Mr. *Despard Taylor* had consented to obtain this discount or advance upon certain terms specified in a memorandum signed by him, and now submitted ; as follows : ‘ Having taken a transfer from Mr. *Hime*, of Gardiner-street, of 500 shares, sold him, as I conceive, to benefit the Bank, in April, 1836, and Mr. *Hime* having commenced an action against me for the full value of the shares, stating he had a personal claim upon me, I, to prevent a publicity of bank affairs, which Mr. *Hime* threatened, and for the advantage of the Bank, took a transfer back from Mr. *Hime*, at par : and I hold the Bank should take the half thereof ; and if the Bank do, I shall procure for them, without commission, at 5*l.* per cent., a discount of 3000*l.* 29th September, 1837. (Signed,) DESPARD TAYLOR.’ Ordered,—That the proposition of Mr. *Taylor* (as better terms cannot be had), be agreed to and confirmed. The shares to be transferred, free from charge of outfit, and no dividend to be claimed on the 250 shares so transferred.” Accordingly, on the 30th of September, 1837, bills to the amount of 2117*l.* 5*s.* 4*d.* were delivered to Mr. *Taylor*, and he was debited in account with the amount thereof ; and on the 2nd of October, 1837, a deed of assignment was executed by Mr. *Taylor* alone, whereby he assigned 250 shares of the Agricultural and Commercial Bank to the same trustees, as in the former deed ; and entries were

made in the books of the Bank, stating the re-purchase of the 250 shares by trustees for the Bank from Mr. *Taylor*, in consideration of the sum of 250*l.* This transfer appeared to have been approved of by three of the Directors.

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At the several times when this and the former transfer were made, the market price of the shares of the Company was far below par.

Mr. *Taylor* afterwards applied to the Directors to re-purchase the remaining 400 shares which he held; and on the 10th of November, 1837, this entry was made in the minute book of the Board of Directors: "Upon reference by Mr. *Hodges*, cashier, as to Mr. *Taylor's* transactions, the Board are unanimously of opinion that they cannot entertain any question as to the stock transactions until his check is paid, for which he got value; then the Board will entertain all questions as they deserve." The check referred to was for the sum of 600*l.*, the balance due by Mr. *Taylor*, on account of the discount transaction of the 28th of September, 1837. He afterwards paid the 600*l.*; and on the 16th of November, 1837, it was ordered by the Directors, "that Mr. *Taylor's* stock be taken from him at 7*s.* 6*d.* per share, he re-conveying it to the trustees, and handing over the order which he holds for the third instalment, as also taking a bill at three months for the value." Accordingly, by indenture of the 16th of November, 1837, *Despard Taylor*, in consideration of 150*l.*, assigned to the trustees, as in the former deeds, 400 shares in the stock and funds of the Bank; and the re-purchase of those shares was duly entered in the books of the Company. This transfer was also approved of by three of the Directors of

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the Company : but none of the transfers were executed by the transferees, nor were they registered pursuant to the 6 Geo. IV. c. 42, s. 22.

After Mr. *Taylor* had thus parted with his shares in the Bank, a registry of persons who had ceased to be members of the Company, in the form prescribed by the second schedule of the 6 Geo. IV., c. 42, was, on the 23rd of November, 1837, filed by the Bank at the Stamp Office, stating therein that Mr. *Taylor* had ceased to be a member of the Bank ; and also (he having been, during his connexion with the Bank, registered as one of the public officers thereof), that he had ceased to be a public officer of the Company ; and from thenceforth, until May, 1843, the name of Mr. *Taylor* was omitted in the annual registers of the members of the Company filed at the Stamp Office.

It appeared from the books of the Bank, and from the reports from time to time made by the Directors to the half-yearly meetings of the Company, that the Directors were in the habit of accepting transfers of shares from members to trustees for the Bank, when the circumstances, in their opinion, rendered it a proper measure to be adopted : and the stock so repurchased was carried to an account, entitled, Reverted or Re-purchased Stock. This mode of dealing with the stock of the Company was particularly brought under the notice of the proprietary at a general meeting held the 17th of April, 1837.

On the 2nd of March, 1837, and the 28th of June, 1837, bills were filed in this Court by shareholders of the Company against Mr. *Taylor* and the other Directors ;

the object of which suits was, *inter alia*, to restrain the Directors levying the amount of certain calls ; and by the latter bill an injunction was prayed to restrain the Directors from re-purchasing shares of the Company out of its funds. This latter suit continued pending until the 12th of June, 1838, when it was dismissed by order of the Court.

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At the half-yearly meeting of the Company, held on the 16th of October, 1837, the Directors presented a Report, which represented the nett assets of the Company, after providing for all the liabilities of the Bank, as amounting to the sum of 277,071*l*. At this meeting the proprietary resolved to resume business ; and also passed the following resolution : “ That we hereby, in addition to the powers given to the Directors by the deed of settlement, authorize and instruct the Board of Directors for the time being, as may to them seem expedient and for the interest of the proprietors, to accept transfers of, and to purchase the shares or stock of the Company for the benefit of the other co-partners, at the current or market price.”

The deed of settlement did not expressly authorize or forbid the Directors to re-purchase or accept transfers of shares for the benefit of the Company : it provided, that the laws constituting the Company should not be altered, unless by the vote of two meetings specially called for that purpose ; and that two successive extraordinary general assemblies, specially called for the purpose, in the manner therein mentioned, should have power to make new laws, or amend the existing laws of the Company. The resolution of the meeting of the 16th of October, 1837, was not passed in conformity with these provisions.

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The Bank having resumed business, as before mentioned; the Directors made reports to the half-yearly meetings of the Company, which were adopted by them. These reports represented the affairs of the Company to be in a solvent state; and some of them referred to the purchase of reverted stock, as a matter beneficial to the interest of the Company.

In July, 1838, the Board of Directors entered into a negotiation with certain persons in London, to raise a sum of 50,000*l.*, for the purposes of the Bank; and with that object they issued debentures, or promissory notes, payable in three and four years after date, and transmitted them to the parties in London, by whom they were put in circulation; and Mr. *Langford Lovel Hodge*, one of the defendants in this suit, having advanced money on the security of some of the debentures, became thereby a creditor of the Company to a large amount.

By the official report of the debts and liabilities of the Bank, made by the Directors to the shareholders at the half-yearly meeting held on the 20th of April, 1840, it was stated that the profit on the business transacted at the branches for the last half-year was more than double that of the preceding half-year, and that there was a surplus of assets over liabilities of 204,932*l.*: but, notwithstanding the prospects thus held forth, the Bank again got into difficulties; and on the 18th of June, 1840, it finally suspended payments. This circumstance was next day announced to the proprietary by a circular letter from the Board of Directors; and on the 3rd of July, 1840, a committee of shareholders was appointed to examine into the affairs of the Company. They made their report on the

28th of August, 1843, and stated that, allowing largely for bad and doubtful debts, with other losses, the assets appeared ample for to meet the liabilities. At the half-yearly general meeting of the shareholders of the Company, held on the 19th of October, 1840, it appearing that more than ~~one-fourth~~ of the paid-up capital had been actually lost, it was resolved to discontinue the Company; and a committee of nine persons (called the Winding-up Committee), was, in accordance with the provisions of the deed of partnership in that behalf, duly appointed for the purpose of winding-up its affairs. A special general meeting of the shareholders of the Company was held upon the 6th of March, 1841, at which a report of the Directors was read, stating that the liabilities of the Company, on the 27th of January, 1841, amounted to 103,203*l.*; and it was resolved that a call of 5*l.* per share should be made on the British stock, and 10*s.* per share on the Irish stock, of the Company. In the meantime suits were instituted in the Court of Chancery by creditors of the Company, for payment of their demands out of the personal estate of the Company, pursuant to the provisions of the Bankers' Act, (33 Geo. II., c. 14), and for a receiver: and, on the 25th of June, 1841, a receiver was appointed in the cause of *Acheson v. Hodges*, to collect and receive the personal estate of the Company(a).

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On the 20th of November, 1841, a meeting was held by certain of the shareholders of the Company (but which was not convened pursuant to any provision in the deed), at which it was resolved: That for the purpose of protecting individuals who were willing to join in creating an indemnity fund, certain persons therein named should form a

(a) 3 Ir. Eq. Rep. 516.

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committee of shareholders, distinct from, and independent of the Directors of the Company; and that the shareholders be requested to contribute towards such indemnity fund 10*s.* on each 5*l.* share standing in their names, and 5*l.* on each 25*l.* share, to be paid to the credit of three trustees therein named: and that the said trustees be authorized to distribute the fund, from time to time, under the written authority of the Committee; it being distinctly understood that such fund should not be applied except in the protection of the subscribers to it, and to discharge the necessary expenses of the trustees and Committee. The Committee (which was known by the name of the Shareholders' Committee) accordingly addressed a circular letter to the shareholders of the Company, enclosing a copy of the above resolutions; stating that they were adopted because it had been found that the creditors were proceeding at law against some of the shareholders, notwithstanding the appointment of a receiver over the assets of the Company; requesting the party to pay the contribution mentioned in the resolutions; and stating that "the Committee had good reason to believe that the principal creditors of the Bank would forward their views by selecting, as objects of their proceedings, those members only who did not contribute to the fund proposed to be collected; and that some of them had stayed their proceedings for the present, with a view to their being continued against the defaulting members of the Bank, and such as should not contribute to the proposed fund."

In May, 1842, an order was made in the cause of *Acheson v. Hodges*, whereby it was ordered, that such persons as certain of the shareholders therein named (some of whom were members of the Shareholders' Committee, and others of the Winding-up Committee) should nominate in writing, should have access to the books of the

Company, for the purpose of investigating the accounts generally of the Company, and ascertaining the amount and particulars of the assets and liabilities thereof. In June, 1842, three vacancies having occurred in the Winding-up Committee, three of the Shareholders' Committee were duly elected by the Winding-up Committee to fill their places; and a letter was shortly afterwards addressed by the Shareholders' Committee to such of the shareholders as had not subscribed to the indemnity fund, calling on them to pay their contributions; stating to them the application of the money already received, and informing them that three members of the Shareholders' Committee had been appointed, as above, so that the assets of the Bank, and the winding-up of the affairs of the Company were placed in the hands of persons in whom the shareholders might have full confidence. From thenceforward it appeared that the two Committees acted in unison.

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On the 21st of June, 1842, the Shareholders' Committee having paid off the demand and costs of the plaintiff in the cause of *Acheson v. Hodges*, the bill in that cause was dismissed, and the receiver discharged, and the books were delivered to the Winding-up Committee. They immediately caused the accounts and transactions of the Company to be investigated: and having discovered many transfers of shares, which they were advised were illegal, the Committee, acting under the advice of counsel, revised the stock ledgers of the Company, and caused entries to be made therein, in an ink of a different colour from that in which the former entries had been written (not obliterating or altering any original entry), and so as thereby to show who were the members of the Company. The result of his revision was, that the names of eighty-four persons,

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holding several thousand shares, and who had been considered shareholders and registered as such in the last registry of the Company, were removed from the stock ledgers as shareholders of the Company, in consequence of their shares having been acquired either by illegal transfers, or by hand-entries made in the books of the Company, without any transfers having been executed to them : and the names of 1178 persons, holding 3784 shares, were entered in the stock ledgers as shareholders, such persons' names having been extracted from the branch books and other documents of the Bank, but whose names had never been entered in the books of the head office as shareholders : and the names of 1221 persons were restored to the stock ledger as shareholders, in consequence of illegal transfers, or no transfers having been executed by them. Amongst the latter class, the name of *Mr. Taylor* was inserted as the proprietor not only of the 1100 but also of the 3000 shares : and on the 5th of May, 1843, a registry of the shareholders of the Company, prepared according to the revised stock ledger of the Company, was verified by affidavit, and filed in the Stamp Office.

In September, 1842, *Mr. Langford Lovel Hodge* became pressing for the settlement of his demand : and in that month, the Winding-up Committee requested him to forbear pressing them for payment of the sum due to him, and proposed that he should obtain a judgment against the public officer of the Company for the amount of his demand, to be used, when obtained, only against the defaulting shareholders of the Company. This proposition was acceded to by *Mr. Langford Lovel Hodge* ; without prejudice, however, to his right to proceed as he might be advised against any of the shareholders, for the recovery of his

demand, if he should think it necessary to do so: and judgment by confession was obtained by him against *William Hughes*, the public officer of the Company, for the sum of 520*l*. After the revised registry of the Company had been filed, Mr. *Langford Lovel Hodge* applied to the secretary of the Shareholders' Committee to be furnished with the names of shareholders against whom he should proceed; and he was given the names of several persons appearing on the revised registry, some of whom denied their liability, and all of whom were defaulting shareholders.

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On the 25th of May, 1843, an order was made in the cause of *Hodge v. Hughes*, that the plaintiff should be at liberty to issue a *scire facias* on the judgment against several persons therein named, and, amongst others, against Mr. *Taylor*, upon a suggestion that he was a partner in the Company. This was followed by a letter of the 18th of December, 1843, from the solicitor of Mr. *Hodge* to Mr. *Taylor*, not disclosing the name of his client, but stating that his client had obtained a judgment for 520*l*. against the public officer of the Bank, and that he was instructed to apply to him, as one of the shareholders, for payment; and if not paid, to proceed for the recovery of that sum. Mr. *Taylor* replied, denying his liability; and on the 5th of January, 1844, he was served with a *scire facias* on the judgment obtained by *Langford Lovel Hodge* against the public officer of the Bank. He thereupon, on the 19th of January, 1844, filed the present bill against *William Hughes*, as such public officer, and *Langford Lovel Hodge*, praying that the Bank might be declared to have accepted the several transfers of the shares so purchased by the Bank from him, and that the Bank might be decreed to cause the necessary acts to be done for the purpose of registering and complet-

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ing the transfers: and that the list so registered at the Stamp Office by the Bank, on the 5th of May, 1843, and the entry of the plaintiff's name therein, might be declared to be fraudulent and void: and that the entries in the books, lists, and documents of the Bank, under their control, in which the plaintiff's name had been introduced as a partner thereof, since he ceased to be a shareholder, might be declared to be fraudulent and void as to the plaintiff; and that the same might be brought into Court, and the plaintiff's name, so inserted therein, might be erased therefrom; and that the Bank might be restrained from continuing the plaintiff's name on the said registered list as a shareholder thereof: and that the defendant, *Hodge*, might be restrained from producing or giving in evidence against the plaintiff in his proceedings at law, or any other proceedings to be instituted by him against the plaintiff upon foot of his demands, the said list, or any certificate founded thereon, or the said books and documents: and that further proceedings on the writ of *scire facias* might be stayed.

Mr. *Hughes* relied, in his answer, upon the conduct of Mr. *Taylor*, as cashier, in not keeping regular accounts of the transactions of the Bank (as to which evidence was read); and also upon the unjustifiable advantage he took of the Directors and Bank, in forcing the transfers of his shares upon them at par, at a time when the stock of the Company was almost unsaleable in the market; and also upon his conduct in respect of the 3000 shares, which he sold at a premium and did not account for the profit to the Company, as disentitling him to relief in equity. He insisted that Mr. *Taylor* still continued a shareholder in the Company, and liable to the demands of Mr. *Hodge*, as his shares had never been legally transferred by him:

1.—because the Directors were not authorised to accept a transfer in trust for the Bank ; 2.—because the transfers were not executed by the transferees ; 3.—because one of them was not approved of by three of the Directors ; 4.—because they had not been registered pursuant to the 6 Geo. IV., c. 42, s. 22 ; 5.—because no transfer had ever been made by him of the 1800 shares, the residue of the 3000 shares.

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Mr. *Langford Lovel Hodge* denied unlawful collusion with the Bank or the Shareholders' Committee ; but admitted the arrangement before mentioned, and that he was indemnified against costs.

The *Solicitor-General* (Mr. *Greene*), Mr. *Martley*, and Mr. *C. Haig*, for the plaintiff. Argument.

The Cheltenham Railway Company v. Daniel(a) ; and *The London Grand Junction Railway Company v. Freeman*(b), were cited.

Mr. *William Brooke*, Mr. *Monahan*, and Mr. *Arthur Pakenham*, for the defendant *William Hughes*.

First—The facts show that Mr. *Taylor* is not, by reason of his conduct, entitled to relief in a Court of Equity. Secondly—The transfers by Mr. *Taylor* to the Company are illegal, informal, and invalid. The Directors were not authorized to re-purchase stock with the funds of the Company ; such a proceeding is contrary to the spirit of the 6 Geo. IV., c. 42, the object of which, as especially appearing from sections 2 and 22, was the establishment of co-partnerships of many members,

(a) 2 Railway Cases, 728.

(b) 2 Railway Cases, 468.

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all of whom would be liable : and it was not authorized by the deed of co-partnership, but was impliedly forbidden by it. This is apparent from the clauses in the deed, which prohibit more than a certain number of shares being held by one individual,—and persons jointly interested are considered as one person ; from the power given to the Directors to accept transfers of stock by way of mortgage or security, but purchase is not mentioned ; from the form of transfer given in the schedule to the deed being manifestly adapted only to a transfer from one party to another ; and from such shares being omitted in the enumeration of the several matters of which the property of the Company should consist, though forfeited shares are included in it. Thirdly—Affecting to act as a corporation (as by purporting to create a stock, assignable by the partners), is illegal, unless authorized by Act of Parliament ; *Kinder v. Taylor*(a) ; *Ellison v. Bignold*(b) ; *Blundell v. Winsor*(c) ; *Josephs v. Pebrer*(d) ; *Duvergier v. Fellows*(e) ; therefore, such transfers only which are authorized by the 6 Geo. IV., c. 42, are legal and valid. To constitute a valid transfer under that Act, it must be so made that the transferee shall stand in place of the transferor ; but the 22nd section shows that it is only the person to whom *such* transfer (that is, a transfer registered pursuant to the directions of the Act), is made, who shall stand in the place of the transferor. Here it does not even appear that the transferees have accepted the transfers ; they have not executed them, as by the deed of partnership they are bound to do, before they become members of the Company. Also, it is provided, that no transfer shall take place without the consent of the Directors ; and that no transfer shall be valid unless signed by a

(a) Coll. on Part. App. 917.

(d) 3 B. & C. 639.

(b) 2 J. & W. 503.

(e) 5 Bing. 248.

(c) 8 Sim. 601.

Director, in testimony that the Directors have consented to such transfer. Here, as to some of the transfers, there is no assent by the Directors appearing on the face of the transfer. A transfer which does not conform with the requisites of the Act is a mere nullity; *Preston v. The Collier Dock Company*(a); *Hibblewhite v. M' Morine*(b). As to the specific relief prayed, that the Bank may be restrained from continuing the plaintiff's name on the registry as a shareholder of the Company, it would be difficult to grant it; for the 6 Geo. IV., c. 42, obliges the Company to register their shareholders as they appear in the books of the Company, and the Bank cannot take notice of an illegal transfer.

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It was also argued that if the transfers were legal, the plaintiff had a good defence at law, and ought not to come into equity for relief. *Wallworth v. Holt*(c) was referred to.

Mr. Pigot and Mr. Wall for *Langford Lovel Hodge*.

Admitting that Mr. *Hodge* has lent himself to aid the objects of the Shareholders' Committee, that does not deprive him of his right, as a *bonâ fide* creditor of the Bank, to sue any member of it. The plaintiff's complaint is that his name has been improperly put on the registry of May, 1843; but supposing it were not put there, yet Mr. *Hodge* might and can show that Mr. *Taylor* is liable to him, as a shareholder of the Company, who has never parted with his shares. The registry, though made evidence by the 1 Will. IV., c. 32, is not conclusive, or the only evidence of membership; *Edwards v. Buchanan*(d);

(a) 2 Railway Cases, 335.

(b) lb. 151.

(c) 4 M. & C. 619.

(d) 3 B. & Ad. 788.

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Morgan v. O'Beirne(a). It may be proper to restrain Mr. Hodge from using the registry of 1843 as evidence; but there is no ground to restrain him from proceeding at law. *Harwood v. Law*(b) was referred to.

Mr. Martley in reply.

Mr. Hodge is identified, in this suit, with the Company. He is not a creditor who, of his own mere motion, has chosen to pursue his claim against the plaintiff; nor is this the case of a creditor who has been put in motion by some of the shareholders, to enforce his claim against another shareholder, whose liability is unquestionable; but this is the case of a creditor, who, at the instance of the Company, and on their indemnity, and for their benefit, has permitted his name to be used, to sue a party who, long before the time when the debt was contracted and the judgment against the public officer was obtained, appeared upon the registry of the Company to have ceased to be a shareholder; the Company, in favour of itself, creating a *prima facie* case against the party, by means of entries in their books and registers improperly and irregularly made by them. As between Mr. Taylor and the Company the transfers are valid. *The Cheltenham Railway Company v. Daniel*, and the other cases which have been cited, establish that the parties to a transfer may, as between themselves, dispense with the formalities required by the Act. Here the Company is, by its own acts, estopped denying that there has been a transfer.

As to the 3000 shares, the evidence has established, in

(a) 2 Hud. & B. 281.

(b) 7 M. & W. 203.

opposition to the answer of the defendant, that this was an agency transaction, and that those shares never were the property of Mr. *Taylor*. It is said that Mr. *Taylor* sold some of them to persons who applied for shares at the Bank house, and that his conduct in that respect was a fraud upon the Company; but it is plain that the Bank did not desire to appear publicly in the selling of shares; and even were it otherwise, Mr. *Taylor's* conduct in that respect would not make him a partner.

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As to the 1100 shares:—it is said that the Directors were, by the deed, impliedly prohibited re-purchasing them. They were not authorized, in terms, to re-purchase shares; but by the 87th clause it was provided, that the Board of Directors should have the entire superintendence and control over the affairs and concerns of the Company; and should, in all cases provided for, act in strict conformity to the laws and regulations established by the deed of settlement; but in all cases, for the time being, unprovided for by the deed, it should be lawful for the Board of Directors to act in such manner as should appear to them best calculated to promote the welfare of the Company. It is stated by Mr. *Dwyer*, in his evidence, that the re-purchase of the plaintiff's stock was a *bonâ fide* transaction, agreed to by the Directors, because they thought it to be a measure conducive to the welfare of the Company: and when the subject of re-purchasing stock was brought before the meeting of the shareholders, they approved of the conduct of the Directors therein.

The assent of the Directors was only required in cases of transfers from one individual to another; here the Directors have, on the face of the transfers, assented to all of

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them except that for 450 shares ; and it appears from the minute book of their proceedings, that they did, in fact, assent to that transfer also. It was the duty of the Company to have had the transfers properly registered ; and having neglected to do so, they cannot now take advantage of their own wrong. The 6 Geo. IV., c. 42, requires a registry of persons who have ceased to be members, to be made from time to time—that is, according as they cease to be members : but it is to be inferred from the same Act, as amended by the 1 Will. IV., c. 32, that the registry of transfers is only to be made once a year. This shows, that, as between the parties to the transfers, registry of the transfer is not essential to the validity of the transaction.

As to the relief prayed, even though Mr. *Taylor* may be liable at law to third persons, yet he is entitled, in equity, to restrain the Company using the names of such persons to enforce that legal liability. He is also entitled to have the registry reformed by having his name erased therefrom ; for the registry of 1837, and the subsequent ones, in which his name was omitted, were according to the truth ; and nothing was afterwards done to alter his liability. A creditor of the Company may be entitled to sue Mr. *Taylor*, but he can have no right to use against him the evidence afforded by this fraudulent registry.

Judgment.

THE LORD CHANCELLOR :—

In this case the plaintiff, who was a shareholder in the Agricultural and Commercial Bank, seeks a declaration that the Bank accepted the several transfers of the shares which he held ; and that the registry of his name, in

May, 1843, as a member of the co-partnership, may be declared fraudulent; and that certain recent entries in the books may be erased; and that Mr. *Hodge* may be enjoined from using the evidence afforded by the register, and by the books as altered. The plaintiff was originally the cashier of the company, and subsequently became a Director. He acquired two classes of shares—one to the number of 3000, merely as an agent for the sale of them, with the profit of any premium which he could obtain. His case is, that he sold 1200 of this class, and accounted for the price to the Bank; that they accepted the rest as part of their stock; and a bill which he had given for the amount of all the shares, 3150*l.* was returned to him, and that account was balanced in the books. The other class, 1100 in number, consisted of shares which he acquired, and which he sold to the Bank, and of which they took transfers to trustees; and that account was also closed and the balance paid. The balance due from him as cashier was duly paid to his successor, and accounted for: and the balance of the general account must also, I think, be considered to have been finally settled and paid in 1837.

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The plaintiff had, under the 6 Geo. IV., c. 42, been returned to the Stamp Office as a public officer, and also as a member of the Bank; and in November, 1837, in compliance with the Act, his name was returned to the Stamp Office as having been removed from his office, and also as having ceased to be a member; and for the five succeeding years, his name was kept off the returns, although returns of the actual members were regularly made.

After the difficulties of the Bank had ended in insolvency, the shareholders named a committee to investigate the con-

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cern. They found it necessary to require a contribution from the members. A committee was appointed by the shareholders; and the latter were requested to contribute according to certain proportions agreed upon. The Committee, by their circular of the 1st December, 1841, to the shareholders individually, while they held out hopes to the contributors that they would only have to pay a rateable proportion, stated that they had good reason to believe that the principal creditors of the Bank would forward their views by selecting, as objects of their proceedings, those members only who did not contribute to the proposed fund: and that some of the creditors had stayed their proceedings with that view. In pursuance of this plan, new Directors were appointed; the books were examined and new entries made in a different coloured ink, and with true dates, by which upwards of 2400 persons, who had ceased by common consent to be members of the Bank, including the plaintiff who had refused to contribute to the fund, were brought forward as continuing members on various grounds; and, as far as relates to the plaintiff, upon the ground that some of the transfers of his shares were informal, and void in law. His name was thus, in 1843, again returned to the Stamp Office as a member; and the name of a purchaser of some of his shares, which had been on the register ever since his had been taken off, was actually omitted by the Committee. The Court cannot but regret that this rendered an oath necessary on the part of the officer by whom the return was made, and that the officer was induced to take it.

Mr. *Hodge*, the defendant, became a creditor of the Bank subsequently to the withdrawal of the plaintiff's name as a member. I shall not stop to consider the vali-

dity of the debentures which he claims. It appears, clearly, from his answer, which has been read by the plaintiff, that the Company gave him a judgment by confession against their public officer, in order to enable him to go against a member for his demand, under the 6 Geo. IV.; and that this was by an arrangement with him, that they should select the victims from the contumacious alleged shareholders, he being indemnified against costs, and reserving his right to go against any other person in case he should be defeated. Now this was a proceeding contrary to the spirit of the Act, which gave the right of selection to the creditor; and not to the majority of the partners, to enable them to throw the burthen on the minority: and alike contrary to the letter; for the 19th section of 6 Geo. IV. expressly provides, that any person against whom execution is issued, shall be reimbursed all loss and costs out of the funds of the co-partnership; or in failure thereof, by contribution from the other members, as in the ordinary cases of co-partnership. And by the thirty-first article of the deed of settlement of 1834, it is in like manner provided, that where execution upon any such judgment is issued against any member, he shall be reimbursed out of the funds of the Company all his loss and expenses; and he is to have a right of action against any officer or other member of the Company for what he shall have paid. In *Const v. Harris(a)*, Lord Eldon laid it down, that although the majority might bind the minority fairly in a partnership, yet that an agreement by a majority to overrule the minority, without reference to merits, would be rescinded by this Court. The parties must not abuse even a legal right. Here the whole was a contrivance to enforce indirectly against the plaintiff the contribution

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(a) T. & R. 518.

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which they did not venture directly to impose upon him. This was, I think, a fraud in the view of equity ; and I feel no difficulty in declaring that Mr. *Hodge* cannot avail himself of it : and therefore the injunction against him must be made perpetual. He was the mere tool of the Company ; and he could not, in any view of the case, claim a higher right than they possess.

This leads me to the consideration of their case. It was argued that they stood on higher grounds than Mr. *Hodge* did. They insist that the plaintiff never ceased to be a member, although his name was improperly withheld from the register, from 1837 until they restored it in 1843.

The 3000 shares, it was urged, were to be treated as the property of the plaintiff. His application for them, and the compliance of the Company with the application were proved : he sold 1200 of them at a profit, which profit he retained for his own use ; although, as to some of them, the purchaser went direct to the banking-house for them, and the plaintiff sold them across the counter : and no re-transfer was executed of the remaining 1800 shares : therefore, it was said, he was still a member of the Company. Now the case which was proved is, that the Directors allotted 20,000 shares amongst themselves and the other officers for sale at par, with one shilling a share for outfit ; and any premiums were to be for their own benefit. The parties gave bills for the amount as a security, and not as payment ; and the forms of an application and acceptance of this security were gone through. 10,000 shares were allotted to Mr. *Palmer*, the Director ; and he, not having sold any, re-transferred them all, and got his bill back : and *Hughes* himself, the defendant, who now seeks to fix the plaintiff with his 3000 shares, had 5000

shares allotted to him ; and he, in like manner, re-transferred them. The only difference between these cases and the present is, that the plaintiff sold 1200 of the 3000, and did not re-transfer the rest. But he regularly paid to the Bank 1260*l.* the price agreed upon for the shares which he sold ; and although no actual transfer of the remaining shares was executed, yet his bill for the 3150*l.* was returned to him, and is regularly entered in the books as for the re-purchase from him of the 3000 shares, and the account was regularly closed. I think it clear that this transaction cannot now be opened, but is binding in equity, notwithstanding the provisions of the Act of Parliament and of the deed of settlement. If the plaintiff, in the sale of the 1200 shares, obtained any undue advantage which he is not at liberty to retain, that would not constitute him a partner as to those shares, or justify the attempt made to compel him to pay Mr. *Hodge's* demand.

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I now come to the transactions as to the 1100 shares. As to the portion of these shares bought by the plaintiff of *Chadwick*, it was objected that they were consolidated so as, in effect, to give a premium upon them to the plaintiff ; but this objection, if well founded, cannot constitute the plaintiff a continuing member of the Company.

The 1100 shares were purchased by the Company at three several periods : the last purchase of 400 shares was at the market price ; but the two previous ones were at par, whilst the price in the market was greatly depreciated. But both these purchases were bargains regularly made in consideration of the plaintiff discounting bills for the Company ; and, although the terms are alleged to be unreasonable, yet that would not justify the proceedings against the plaintiff, for which he seeks the injunction of this

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Court. No actual fraud is attempted to be proved; and Mr. *Dwyer*, the Director, proves that all the three purchases and transfers were made *bonâ fide*. They were all, I may observe, regularly entered in the books. It was said, besides, that the purchases were made during the stoppage and insolvency of the Company. But business was resumed by the Bank; and favourable reports were made, and large amounts of surplus assets taken credit for, during the years which followed the plaintiff's retirement from the partnership. These general objections cannot, I think, prevail.

It was then objected,—1. that the Directors had no power to purchase shares: 2. that in November, 1836, they had resolved not to make any purchases until business was resumed: 3. that if they could purchase, some of the assignments were not valid: 4. that if valid, they were not registered: from which it was concluded that the plaintiff was still a partner. All these shares were transferred by the plaintiff, by deeds, to three persons, who were described as trustees acting for and on behalf of the Bank, under the trusts or powers contained in the deed of settlement of 1836. In support of the first objection, it was said, that a purchase by the Company was contrary to the 6 Geo. IV., c. 42, sections 2 and 22; for all the individuals composing the co-partnership were made liable by sec. 2; and they could only discharge themselves of the liability by a transfer to another, under sec. 22: and the assignee under that section must be a *bonâ fide* holder, and not a trustee for the Company. I think that the Act of Parliament did not prevent or interfere with the *bonâ fide* retirement from the co-partnership of any member; and, therefore, that the Company might buy out a partner notwithstanding the Act. It was said that such a purchase was

also struck at by the deed of settlement of 1836. It was admitted that it was not expressly forbidden ; but the context of the deed was resorted to, in order to make out a case of exclusion ; and the prohibition in clause 10 against any individual holding more than a limited number of shares was relied upon. After an attentive consideration of the deeds, I do not think that they prohibit the Company from buying out a partner ; and the mode in which they thought fit to execute their purchases is, I think, unimportant. The prohibition in clause 10 cannot apply to the Company ; and other clauses, which were referred to, show that the Company might become possessed of a much larger number of shares. The power in the 87th clause to the Directors or Consulting Committee to act, in cases unprovided for, in such manner as they should think best calculated to promote the welfare of the Company, would, I think, fully warrant the acts which they have done. Great numbers of shares were thus purchased ; and the Company are not at liberty now to say that the Directors were not authorized to make the purchase. They cannot claim a privilege higher than any other co-partnership. Lord Eldon, in *Const v. Harris*, to which I before referred, said(a), that articles which had been agreed on to regulate a partnership, could not be altered without the consent of all the partners, but that if alterations were made by some of the partners, and acquiesced in by all, the Court would hold that to be an adoption of new terms. This, I may observe is a rule always acted upon. Now, in this case, purchases were openly made, and regularly entered in the books ; the stock accounts explain the transactions ; and the purchases were adopted by the Company at large after full notice. The reports which have been put in evidence

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(a) 1 T. & R. 517.

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expressly refer to the extensive purchases of shares by the Company ; and in 1837 a general meeting gave a direct authority to purchase without complaining of previous purchases. In 1837 a bill was filed for the express purpose of impeaching purchases by the Directors ; but the plaintiff allowed that bill to be dismissed.

The second objection cannot, I think, be supported : for the resolution of November, 1836, was, that no transfer of stock should be sanctioned by the Board till the resumption of business by the Company ; which did not, I think, prevent the Board itself from purchasing, but referred to transfers between party and party : at all events, the Directors were competent to rescind their resolution. The resolution of the general meeting, October, 1837, authorizing and instructing the directors to make such purchases, is stated to be in addition to the powers given to them by the deed of settlement. But that would be correct if the deed did invest them with the power : for a direction to them to do the act was an addition to the power vested in them to execute it. This resolution, besides, was manifestly occasioned by the bill of 1837 to enjoin such purchases, and clearly proves the intention of the Company.

As to the third objection, I think that cannot prevail : for the transfer was in effect to the Company, and they thought fit, in some instances, to dispense with the machinery which the legislature rendered necessary in such a case. This they were at liberty to do, even at law, according to the *Cheltenham Railway Case*(a) ; and they cannot now, as between themselves and the partners with whom they contracted, impeach the transaction.

(a) 2 Rail. Ca. 728.

The fourth objection is of the same nature : but an assignment may be valid, and a member's name duly registered in lieu of the seller's, although, by the 9th sec. of 1 Will. IV., the transfer is not registered until a later period. The duty, moreover, of making a return of transfers seems, under the Act, to devolve on the Company ; and if so, they cannot take advantage of their own neglect. The evidence proves that transfers were constantly accepted by the Company, and that some were defective from want of attention on the part of their officers.

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In conclusion, it appears to me that, under the 6 Geo. IV., the return to be made is of the names of the partners as the same appear on the books of such Society ; and consistently with the principle of the Act, and the decided cases, it may be found difficult for a person who, *de facto*, is a partner, and who appears to be so on the books of the co-partnership, and whose name is registered as such, to discharge himself of his liability to creditors by showing that the transfer to him was informally executed. And I am not satisfied that the return of the plaintiff's name in 1843 was authorized by the Act, even at law ; for after he had ceased to appear as a partner on the books for seven years, and his name had been withdrawn from the register, it can hardly be maintained that new entries, made for the mere purpose of charging him, can be deemed an entry of his name " as a partner concerned in the co-partnership, as the same appears on the books ;" for by the books it appears, that for seven years he had ceased to be a partner, and that no new contract had been entered into with him, but an entry had been made, that the transfers by him were invalid, in order to create a continuing liability. But however this may be at law, I think that in equity this was a transaction

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which cannot be maintained, and that I must consider all parties bound by the acts of the former Directors. I am bound, therefore, to give the relief prayed; and as I cannot approve of this mode of attempting to make a person, who had for so many years ceased to be a member of the co-partnership, liable for transactions to which he was no party, I think that the decree should be with costs.

Decree.

Declare that the several transfers of shares by the plaintiff to the society or co-partnership called the Agricultural and Commercial Bank of Ireland, or the trustees thereof in the pleadings mentioned, were accepted by the said Society; and declare that the list registered by the said Society on or about the 5th May, 1843, in the pleadings mentioned, is fraudulent and void as to the insertion of the plaintiff's name therein; and declare that the entries in the books, lists, and documents of the said Society or co-partnership, in which the plaintiff's name has been introduced as a shareholder thereof, since the date of the last of said transfers of shares on or about the 14th day of November, 1837, are fraudulent and void as to the plaintiff. And let all such books, lists, and documents of said Society, in their custody, possession, or control, be brought into the office of Edward Litton, Esq., one of the Masters of this Court, on oath; and let the said Master erase the plaintiff's name therefrom: and let an injunction issue to restrain the said Society or co-partnership from continuing the plaintiff's name on the registered list of the shareholders of the said Society or co-partnership: and let the said Society or co-partnership do all necessary acts remaining to be done, for the purpose of completing said transfers of shares by plaintiff, and also the registry of the several other

transfers of shares by plaintiff in the pleadings mentioned, and the registry thereof at the Stamp Office: and in case the parties differ respecting the form in which such transfers are to be completed and registered, refer it to the Master to settle the same. And let the injunction which issued in this cause to restrain the defendant, *Langford Lovel Hodge*, from all further proceedings on foot of the writ of *scire facias* sued out by him against the plaintiff, in the pleadings mentioned, be made perpetual. And let the defendant pay to the plaintiff his costs of this cause, when taxed and ascertained, and refer it to the Master to tax the same. And the defendant, *William Hughes*, so desiring, let the Master, in taxing such costs, ascertain whether the costs of the schedules to the answer of the defendant, *William Hughes*, were improperly or unnecessarily incurred by reason of the plaintiff's requiring such schedules; and if so, disallow to the plaintiff all such costs so improperly incurred; and in that case, let the plaintiff pay to, or set off against the defendant, *William Hughes*, the costs of the said defendant, caused by such unnecessary schedules.

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Two persons, equally entitled to certain unenclosed slobbs, agreed to allot certain parts thereof to each of them, in severalty; and to refer it to arbitrators to award what portions of the unallotted slobbs should be allotted to each of them for equality of partition: *Held*, that the insufficiency of the unallotted slobbs to compensate one of the parties for deficiency of his

part of the allotted lands, arising from a matter which occurred subsequently to the arrangement between them, but which was in their contemplation at the time, did not give him an equity to have compensation out of the lands allotted to the other party.

An agreement to refer, and arbitrators named, and a covenant not to sue, and a power to examine witnesses upon oath, and to make the submission a rule of Court, prevent a party from filing a bill with the view of withdrawing the case from the arbitrators.

A party to a suit cannot set up an objection which grew out of his own conduct.

Two arbitrators were named in a submission to refer; and they, or other the persons appointed in their place, were, before they proceeded, to appoint a third arbitrator: any two of the arbitrators for the time being, might, at any time, or from time to time, make awards or orders, provided the last of such awards should be made before the 1st of July, 1843, or before such other later time as any two of the arbitrators for the time being, should appoint: and any two of the arbitrators for the time being, might extend the time for making the last award, whether such time should have previously expired or not. And it was provided that *X.* should, as soon as conveniently might be, appoint an umpire; and that if no two of the arbitrators for the time being, should be able to agree in making an award or order concerning any matter which ought to be awarded or ordered by them, such matter should be awarded or ordered by the umpire: and if at any time before the several powers, authorities, covenants, and provisions, in the deed of submission were executed, either of the arbitrators named by the parties should refuse to act, the party whose arbitrator so refused, should appoint another in his place; and if he did not do so within fourteen days, then that the third arbitrator, and if none such, the umpire should appoint such arbitrator.

The plaintiff's arbitrator refused to act, and nothing was done in the matter of the reference before the 1st of July, 1843. The plaintiff having, after that day, refused to appoint an arbitrator, the defendant procured *X.* to appoint an umpire, who appointed an arbitrator on behalf of the plaintiff, and the two arbitrators appointed a third, and then the time was extended by the three arbitrators: *Held*, that the time was duly extended.

IN 1836, the Governor and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, commonly called the Irish Society, came to a resolution to grant to *Thomas Isaac Dimsdale*, the plaintiff, a lease of certain waste lands, mud banks, or slobbs of Lough Foyle, of which they were seised in fee-farm, for a term of 100 years, from the 1st of January, 1837, at the yearly rents therein-mentioned; with a provision for the extension of the term for two further separate terms of 100 years each, upon payment of the fines and at the rents in the agreement mentioned: and it was by this resolution expressly stipulated that, unless 20,000*l.* should be expended in reclaiming the waste lands therein specified, on or be-

fore the 1st of January, 1840, the same should be null and void.

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Having become thus interested in the slobbs of the Foyle, Mr. *Dimsdale*, with the sanction of the Society, applied to Parliament, in the session of 1837, for an Act to enable him to embank and drain them, and also certain other waste lands, mud banks, and slobbs of Lough Swilly, the property of the Crown; and as to which the Commissioners of Woods and Forests, on behalf of the Crown, had intimated, by letter, to Mr. *Dimsdale*, that they would recommend the Lords of the Treasury to grant them to him in fee, upon certain conditions: and a bill was accordingly introduced into the House of Commons for that purpose. That bill passed the House of Commons; but while it was in Committee in the House of Lords, the Session suddenly terminated by the death of King William the Fourth.

By reason of the opposition made to the bill, Mr. *Dimsdale* was put to great expenses, and became indebted in large sums of money, advanced by *J. G. Booth*, *F. Stedman*, *F. W. Staines*, *T. Edge*, *J. Whiskin*, and *C. H. Stedman*, and others, upon the security of the undertaking; and, his own resources being exhausted, he was introduced to the defendant, *John Robertson*, as a person of such means and influence as would likely be of service to him in obtaining the passing of the intended bill; and an agreement, in writing, dated the 31st October, 1837, was entered into between them, whereby Mr. *Dimsdale*, amongst other things, agreed to deposit with Mr. *Robertson* the grant from the Irish Society relating to the slobbs of Lough Foyle, and all other evidences and muniments of title relating thereto, upon which he had founded his application

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to Parliament for the drainage and reclamation of the slobbs in Lough Foyle and Lough Swilly, and all papers relating to that application : and it was agreed that Mr. *Dimsdale* should immediately proceed to Ireland for the purpose of giving the notices required by the standing orders of both Houses, in order to enable a bill to be brought into Parliament in the then next session for the same purpose : that Mr. *Robertson* should be at all the expense attending the journey of Mr. *Dimsdale* to Ireland, and of giving the notices, to the extent of about 200*l.* That it should be at the option of Mr. *Robertson* (such notices having been given and paid for), to elect, on or before the 1st of February, 1838, whether or not he would, in co-operation with Mr. *Dimsdale*, cause a bill to be brought into Parliament, and prosecuted during the then next or any succeeding Session, for the purposes for which the former application had been made. That in case he should elect to do so, the bill should be prosecuted upon the following terms and conditions;—that Mr. *Robertson* should, whenever required, after such election made, pay and satisfy the outstanding claims of the parliamentary agents, counsel, and engineer, upon Mr. *Dimsdale*, or the solicitor employed in the prosecution of the bill of the last session, up to the extent of 1500*l.* ; that he should also pay and defray all the expenses of the bill to be brought in : that in case the bill should pass, Mr. *Robertson* should be entitled to three-fourth undivided parts of all the land to be reclaimed, and of all the benefits and advantages derivable from the measure ; which he should be at liberty either to hold and enjoy himself, or to distribute among other persons as he might think fit ; and that one-fourth undivided part thereof should belong to Mr. *Dimsdale*, with the same power of distribution : that all incidents to the possession of the property, such as

votes as to measures to be determined upon in the prosecution of the object, should be used and enjoyed in the same relative proportions ; that, on the Act passing, Mr. *Robertson* should immediately pay such amount as, together with the sums amounting to 1500*l.*, paid by him on making his election to proceed with the bill, should amount to 3000*l.*, to the solicitor, engineers, witnesses, and other persons concerned in prosecuting the bill of the last session, in discharge of their respective claims ; the payment and application thereof to be under the order and direction of Mr. *Dimsdale*; the same to be exclusive of the expenses of the notice. That, upon the passing of the Act, the funds necessary for carrying the same into effect, for the reclamation and drainage of the slobbs in question, should be provided by Mr. *Robertson*, and such persons as he might admit to a participation of his shares in the undertaking ; but such funds and advances, and likewise all the previous advances made and to be made by Mr. *Robertson*, under the terms of this agreement, including the notices and the expense of any survey which Mr. *Robertson* might require to be taken previously to his making his election, should be a charge upon all the reclaimed lands and all the profits of the undertaking, and should be first paid thereout to the parties advancing the same. That from and after the passing of the Act, Mr. *Dimsdale* should be entitled to receive from Mr. *Robertson*, and such other parties as might be admitted to the undertaking as aforesaid, the sum of 700*l.* annually for management ; but the same to be deducted by them out of the profits of the undertaking in the same manner as the other advances before provided for. That upon all advances made by Mr. *Robertson*, and such other persons as aforesaid, interest should be computed at the rate of 5*l.* per cent. per annum, from the respective times of the payment and

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advance thereof; and such interest should be added to the principal sums advanced, and become a charge upon the undertaking, and be repaid in the same manner as was thereinbefore provided with regard to the aforesaid payments and advances.

After the execution of this agreement, a treaty was set on foot by Mr. *Dimsdale* and Mr. *Robertson* with the Irish Society for an extention of the time limited for the expenditure of the 20,000*l.* mentioned in the resolution of 1836; and on the 21st of May, 1838, an agreement was made and executed between the Governor and Assistants of the new plantation in Ulster, of the one part, and Mr. *Dimsdale* and Mr. *Robertson* of the other part, whereby the former agreed to grant, and the latter agreed to accept, a lease of the waste lands, mud banks, and slobbs of Lough Foyle, for the term in the resolution of 1836, mentioned: and it was provided, that if the sum of 20,000*l.* were not expended by Mr. *Dimsdale* and Mr. *Robertson* upon the premises, within four years from the 1st of January, 1837, the agreement should be void.

In the session of 1838, the application for an Act was renewed; and a bill having been introduced, it passed both Houses, and received the royal assent on the 27th of July, 1838. It enacted, amongst other matters, that *J. G. Booth*, *Thomas J. Dimsdale*, *F. Edge*, *John Robertson*, *F. Stedman*, *F. W. Staines*, and *J. Whiskin*, their heirs and assigns, should be undertakers for executing the purposes of the Act, so far as the same related to the Lough Swilly and the waste lands, mud banks, and slobbs thereof: and that the same persons, their executors, &c., should be undertakers for the purpose of executing the purposes of the

Act so far as the same related to Lough Foyle, and the waste lands, mud banks, and slobbs thereof: and the undertakers were thereby empowered to embank from the sea, drain and otherwise improve, all and singular, and so many and such part and parts of the waste lands, mud banks, and slobbs, in Lough Swilly and Lough Foyle, as lie below high-water mark at ordinary spring tides, except as therein excepted, and within the boundaries therein particularly described; and also (with the consent of the owners, or reputed owners, of the adjoining estates) any other of the waste lands, mud banks, or slobbs, situate in Lough Foyle; subject, amongst other provisoes, that nothing in the Act should extend to give any power to the undertakers to do any act which, in the opinion of a competent engineer, to be appointed, jointly, by the Lords of the Admiralty and the undertakers, would injure the present navigable channel of Lough Foyle: and it was declared that nothing therein should extend to confirm, alter, weaken, or in any manner prejudice or affect the agreement of the 21st of May, 1838: and it was declared, that upon the terms and conditions therein mentioned, the waste lands, mud banks, and slobbs, in Lough Foyle should vest in the undertakers, their executors, &c., for a term of 300 years, from the 1st of January, 1837; and the waste lands, mud banks, and slobbs of Lough Swilly, should vest in the undertakers and their heirs for ever. And it was further enacted, that in case the embankment should not be commenced within two years after the passing of the Act, and in case 20,000*l.* should not be expended on the level of the Foyle, and 3000*l.* on the Swilly level before the 31st of December, 1841, then, in either of such cases, the powers, authorities, and privileges thereby given in reference thereto, should absolutely cease; and the respective waste lands, mud banks, and slobbs should

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revert to the persons or corporations who would have been entitled thereto if the Act had not been passed. And it was further provided, that nothing in the Act should extend to authorize the making or erecting any work below the ordinary high-water mark at spring tides, without the assent of the Lords of the Admiralty having been first obtained for that purpose, to be signified in the manner therein mentioned. The Irish Society afterwards extended the time mentioned in the agreement of the 21st May, 1838, for expending the sum of 20,000*l.*, to the 31st December, 1841, so as to make it correspond with the time limited for that purpose by the Act.

The undertakers agreed amongst themselves that all the waste lands, mud banks, and slobbs, in the Act mentioned, should be divided amongst themselves in equal shares; and *J. G. Booth, F. Stedman, F. W. Staines, J. Edge, and J. Whiskin*, agreed to sell their shares to *Mr. Dimsdale* and *Mr. Robertson*: and, by indenture of the 24th of August, 1839, *Mr. Dimsdale* and *Mr. Robertson* conveyed the Lough Swilly slobbs to Messrs. *Booth, Stedman, Staines, Edge, and Whiskin*, and their heirs, and the Lough Foyle slobbs to them and their executors, &c., subject to redemption upon payment of the sum of 4241*l.* 13*s.*, with interest. This mortgage was afterwards paid off by *Mr. Robertson*; and by indenture of the 20th of November, 1840, the mortgagees conveyed the Lough Swilly slobbs to *Mr. Dimsdale* and *Mr. Robertson*, and their heirs, discharged of the sum of 4241*l.* 13*s.*; as to one undivided moiety thereof, to such uses as *Mr. Dimsdale* should appoint; and in default of appointment, to the use of *Mr. Dimsdale* for life; with remainder to *Mr. Robertson* and his heirs during the life of *Mr. Dimsdale*, in trust for him;

remainder to the use of the heirs and assigns of Mr. *Dimsdale*: and as to the other moiety thereof, to similar uses in bar of dower in favour of Mr. *Robertson*. And by another deed of the 21st of November, 1840, made between the same parties, the Lough Foyle slobbs were assigned to Mr. *Dimsdale* and Mr. *Robertson*, in equal shares as tenants in common.

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In October, 1840, it was alleged by Mr. *Robertson*, and admitted by Mr. *Dimsdale*, that the sum of 16,500*l.* had been expended by the former in the prosecution of the undertaking, and the preliminary expenses; out of which Mr. *Robertson* had received and been paid the sum of 6000*l.*, leaving 10,500*l.* for which he was entitled to credit as against the undertaking: and disputes having arisen between the parties, a deed of covenant and submission to arbitration, dated the 18th of June, 1841, was executed by and between them, whereby, after reciting, among other things, that it was lately agreed between the parties that Mr. *Dimsdale* should, on the 18th of September, 1841, pay to Mr. *Robertson* the sum of 5250*l.*, being one moiety of the said sum of 10,500*l.*, and that by way of securing the payment thereof, Mr. *Dimsdale* should deliver to Mr. *Robertson* his promissory notes for the amount thereof, payable with interest, and also give a warrant of attorney, or *cognovit*, to enable Mr. *Robertson* to obtain judgment against him in the Courts of Queen's Bench at Dublin and at Westminster, for the sum of 5250*l.*; and that Mr. *Dimsdale* had accordingly given ten promissory notes to Mr. *Robertson* for sums amounting in the whole to 5250*l.*: and after reciting that Mr. *Dimsdale* claimed, by virtue of an agreement made between the parties, to be entitled to the annual sum of 700*l.* for management of the undertakings: and that it had been agreed that any two of the arbitrators, for the

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time being, acting in execution of the powers or authorities therein expressed, might determine how much, or what part of the annual sum of 700*l.* should cease, and also what compensation in land, if any, should be awarded to Mr. *Dimsdale* in lieu thereof: and after reciting that the parties had lately agreed that a fair and equal partition should be made between them of the waste lands, mud banks, and slobbs in Lough Foyle, in manner after mentioned; and that each of the parties, apart from the other of them, might embank and reclaim his own part thereof, for his own sole and separate use and benefit: and after further reciting that all and every the disputes and differences, matters and things which were not thereby agreed to be referred to such award as thereafter mentioned, had been finally settled and determined between the parties; and that Mr. *Dimsdale* had nominated *George Smith*, and Mr. *Robertson* had nominated *William Tite*, to be arbitrators for the purposes therein mentioned; and that it was agreed that the arbitrators for the time being, acting in the execution or performance of the powers or authorities therein expressed, should have all and every of the several powers and authorities therein expressed or contained: It was witnessed that the parties mutually covenanted with each other that the whole of the waste lands, mud banks, and slobbs in Lough Foyle, lying to the north-east side of the Ballykelly canal, and on the south-east side of the Lough, should become and be the property of Mr. *Robertson*; and should be assigned to him, in severalty, discharged of all incumbrances created by Mr. *Dimsdale*, but nevertheless subject, amongst other things, to the several compensations to the proprietors of the adjoining lands therein mentioned, so far as the same related to the waste lands, mud banks, and slobbs to be assigned to him, and to a moiety of the yearly rent reserved by the agree-

ment of the 21st of May, 1838 : and that the whole of the waste lands, mud banks, and slobs, in Lough Foyle, lying to the south-west of the Ballykelly canal, and on the south-east side of the Lough, should become and be the property of Mr. *Dimsdale*; and should be assigned to him discharged of all incumbrances created by Mr. *Robertson*, but subject as above mentioned. And it was further witnessed that the parties mutually covenanted and agreed with the other of them, that *George Smith* and *William Tite* should be two of the arbitrators for the purposes and with all the powers and authorities therein expressed or contained ; and that they, or other the persons, for the time being, appointed and acting in the places or stead of them respectively, should, as soon as conveniently might be and before proceeding with the business of reference thereby agreed to be made, by writing, signed by them, appoint a third arbitrator for the purposes, and with all and every of the powers and authorities therein contained or expressed ; and that the said three arbitrators, for the time being, acting in the execution or performance of the powers and authorities therein contained or expressed, or any two of the same, should or might, from time to time, make or publish all and every or any one or more of such awards, orders, directions, and determinations as therein mentioned : that is to say, that any two of the arbitrators for the time being, should, as soon as conveniently might be, award whether the whole or any, and what part, and if any, how much or what part of the annual sum of 700*l.* should cease to be paid ; and how much, and what quantity, if any, of the slobs in Lough Swilly, or of the profits to arise by the embankment or draining the same, should be allotted to Mr. *Dimsdale* in satisfaction of any claims of his upon all or any of the slobs in Lough Swilly, or upon or against

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Mr. *Robertson*, in respect of the said annual sum of 700*L.*, or any part thereof: and also, that any two of the arbitrators for the time being, should ascertain the value of the part of each of the parties in the slobbs lying on the south-east of Lough Foyle, and thereby agreed to become and be his property; such arbitrators making due, fair, and proper allowances and deductions in respect of the expenses attending the embanking and reclaiming thereof respectively, and also in respect of compensations, charges, matters, and things, as to them should seem fit; provided that the arbitrators for the time being, should not be obliged to take the actual sums which might have been expended in embanking and reclaiming the said slobbs in Lough Foyle, or the actual quantity of such slobbs which should or might be embanked or improved by both or either of the parties, as any criterion or restriction upon them in ascertaining such value. And further, that for the purpose of ascertaining any such value as aforesaid, any two of the arbitrators for the time being, should themselves ascertain the value of the several parts of the slobbs to be valued as aforesaid, according to their own knowledge, skill, or judgment; or should receive such evidence of the same as to them should seem fit; or should cause the value thereof to be ascertained by such person as to any two of them for the time being, should seem proper: and that any two of the arbitrators for the time being, should award how much, if any, of the slobbs in Lough Foyle, which the undertakers were, by the Act of Parliament, authorized to embank and reclaim with the consent of the owners of the adjoining estates, and of the slobbs on the north-west side of Lough Foyle should be allotted to either of the parties for equality of partition, and by way of compensation for the amount, if any, by which the value of the share of

either of them in the slobbs on the south-east side of Lough Foyle should exceed the value of the share of the other of them in the said last-mentioned slobbs. And further, that any two of the arbitrators for the time being, should award how much of the slobbs in Lough Swilly, or of the moiety of either of the parties therein, should be allotted to the other of them, for equality of partition, and by way of compensation for the amount, if any, by which the value of the shares of either of the parties in the slobbs, lying on the south east side of Lough Foyle, not otherwise compensated for, should exceed the value of the share of the other of them in said last mentioned slobbs. And it was agreed and declared, that the part of the slobbs in Lough Foyle, thereinbefore agreed to become and be the property of Mr. *Dimsdale*, with all such parts and shares in the slobbs of Lough Foyle and the slobbs of Lough Swilly which should be awarded to him by way of equality of partition or compensation, or otherwise, pursuant to this agreement, should be accepted by him in lieu and full satisfaction of all his claims and demands upon or against Mr. *Robertson*, and of all his rights, claims, estates, and interests in or to the slobbs in Lough Foyle; and a similar provision was made as to the parts to be allotted to Mr. *Robertson*. The deed of submission then authorized any two of the arbitrators for the time being, to make an award as to the custody of the title-deeds of the slobbs; and how the compensations, to be made pursuant to the Act, should be borne between the parties; and to award all necessary acts to be done by the parties: and it contained covenants by the parties for further assurance; and to produce all deeds and documents in their possession relating to the matters thereby referred: and every or any two of the arbitrators for the time being, were authorized to examine upon oath all persons produced as

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witnesses by either of the parties; and, if they should think proper, to examine the parties themselves upon oath: and, that in case of the non-attendance of either of the parties, or his counsel, attorneys, agents, or witnesses, after ten days' previous notice in writing given to such person, notifying the time and place of meeting, to proceed in the matter of the arbitration; or in case either of the parties should, in the opinion of any two of the arbitrators for the time being, without sufficient cause or excuse, by non-attendance or non-production of witnesses, or otherwise hinder, delay, or impede, or attempt to hinder, delay, or impede, the arbitrators for the time being, or any two of them, in the business of the reference, or in the making of any award after such ten days' notice, then and in any such case it should be lawful for the arbitrators for the time being, or any two of them, to proceed, *ex parte*, in the reference. And also, that any two of the arbitrators for the time being, should or might, at any time thereafter, make and publish such award, order, direction, or determination, or, from time to time, make or publish such awards, orders, directions, or determinations, of or concerning all or any one or more of the several matters and things thereby referred and submitted, as to them or any two of them, the said arbitrators for the time being, should seem fit or proper: provided that the last of such awards, orders, directions and determinations, should be made and published on or before the 1st of July, 1843, or before such other later or other time as any two of the arbitrators for the time being, should, by writing, appoint for that purpose: and that every two of the arbitrators for the time being, should have power, from time to time, by writing, to enlarge or extend the time therein mentioned for the making of their last award, order, direction, or determination, as to them respectively should

seem fit or proper, and that whether such time should have previously expired or not. And it was agreed, that the senior Master, for the time being, of the Court of Queen's Bench, at Westminster, should, as soon as conveniently might be, after the execution thereof, by writing under his hand, appoint a fit and proper person to be umpire for the purposes after mentioned: and also, from time to time, upon each vacancy in the office of umpire, by death, resignation, neglecting or declining to act, or otherwise, in like manner, to appoint another umpire: and it was agreed, that if no two of the arbitrators for the time being, should be able to agree upon or make any award, order, or determination of or concerning any matter or thing whatsoever, which ought to be or might be awarded, ordered, or determined by any two of the arbitrators for the time being, in pursuance of the submission, then such matter or thing should or might be awarded or ordered by the umpire for the time being: and it was agreed, that immediately after such disagreement between the arbitrators for the time being, respecting any matter or thing referred to them by virtue or in pursuance of the deed of submission, it should be lawful for the umpire for the time being, forthwith to make and publish his award concerning such matter and thing; and that in every case of such disagreement, the umpire for the time being, should have and possess, as to all and every the matters and things respecting which the arbitrators for the time being, should have disagreed, the same powers and authorities given to any two of the arbitrators; and that in every such case, all and every the agreements and provisions therein contained respecting the arbitrators for the time being, and every two of them, or respecting their, or any of their awards, should extend and apply to the umpire for the time being, and his awards and

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acts. It was then provided, that the costs of the conveyances should be borne by the parties entitled to the lands conveyed; and that the costs and expenses incurred pending the arbitration, in embanking and reclaiming the slobbs, and the costs of the reference, should be borne by the parties equally. And it was agreed, that if at any time before the several powers, authorities, covenants, and provisions therein expressed or contained, were fully executed and performed, *George Smith*, or any person who should be, or ought to be, appointed arbitrator by Mr. *Dimsdale*, should die, or refuse, or become incapable to act, Mr. *Dimsdale* should, within fourteen days after such death, or of such refusal or incapacity to act, by writing, appoint some other fit person to be arbitrator in the place or stead of the arbitrator so dying, or refusing, or becoming incapable: and if Mr. *Dimsdale* should in any case fail, within fourteen days after such death, refusal, or incapacity to act, to appoint some fit person to be arbitrator, then the third arbitrator, for the time being, if there were such, or if there were no such arbitrator, then the umpire, for the time being, should, by writing under his hand, appoint some fit person to be arbitrator in the place and stead of any such arbitrator so dying, or refusing or becoming incapable as aforesaid: and a similar provision was made in case of the death, refusal, or incapacity of the arbitrator appointed by Mr. *Robertson*. The parties then covenanted that they would abide by the awards to be made pursuant to the submission; and that neither of them, his heirs, executors, administrators, or assigns, should or would bring or prosecute any action or suit at law, or in Equity, against the other or others of them, touching the matters thereby referred or submitted, or do or suffer any act, matter, or thing, to hinder or delay the arbitrators for the time being, or any of them, or the umpire for the time

being, from, in, or about the making or publishing any award, order, direction, or determination, by virtue, or in pursuance of the submission. And Mr. *Robertson* covenanted that, on payment of the sum of 5250*l.* by Mr. *Dimsdale*, he would indemnify him against all costs and charges which, before the 23rd of March, 1841, had been jointly incurred by the parties as such undertakers: and it was provided that in case either of the parties should fail or neglect, before the 27th of July, 1846, in a proper and sufficient manner, and in pursuance of and according to the provisions of the Act of Parliament, to embank, drain, and improve the whole or any part of the slob in Lough Foyle, so agreed to become and be his property as aforesaid, or which should be allotted to him in pursuance of this submission, then it should be lawful for the other of them to embank, drain, and improve any part of the slob which either of them should have so failed or neglected to embank, drain, or improve; and such parts of the slob of Lough Foyle should become and be the property of the party so embanking, draining, and improving them, discharged of all the claims, estates, rights, and demands of the other of them: and it was provided that the submission might be made a rule of the superior Courts of Westminster and Dublin respectively. This submission was afterwards made a rule of the Courts of Queen's Bench at Dublin and Westminster respectively.

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Upon the execution of the deed of submission, Mr. *Dimsdale* executed his warrant of attorney, authorizing judgment to be entered against him for the sum of 5250*l.*; and by indenture of mortgage of the 21st of June, 1841, he granted and released to Mr. *Robertson* his undivided moiety of the slob in Lough Swilly, sub-

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ject to redemption, upon payment of the sum of 5250*l.* and interest.

By another indenture of the 21st of June, 1841, made between the same parties, after reciting, amongst other matters, that the parties had agreed to make partition of the waste lands, mud banks, and slobbs, on the south-east side of Lough Foyle, and that the partition to be thereby made should be good and valid, notwithstanding any inequality whatsoever in the value of the several shares of the said waste lands, mud banks, and slobbs, thereby assigned to them respectively; and that *James Walker*, civil engineer, had been appointed, as well by the Lords of the Admiralty as by the parties, to be engineer for the purpose of ascertaining the lines of the proposed embankments in Lough Foyle; and that it had been agreed that any dispute which should, at any time thereafter, arise between the parties thereto, relating to the proposed embankments, or to any act, work, matter, or thing, which might injure, or be likely to injure, the then present navigable channel of Lough Foyle, or the making or erecting any work below high water mark at spring tides, without the assent of the Lords of the Admiralty first obtained, contrary to the provisions of the Act, should be referred to the arbitration of *James Walker*: It was witnessed, that Mr. *Robertson* assigned and released to Mr. *Dimsdale* that part of the waste lands, mud banks, and slobbs in Lough Foyle, lying to the south-west of the Ballykelly canal, and on the south-east side of Lough Foyle, more particularly delineated on the map annexed thereto; subject, according to the provisions of the Act, and to the several compensations to which the same were subject by the Act, and to one moiety of the rents, fines, and fees, payable pursuant to the agreement of the

21st of May, 1838 : and Mr. *Dimsdale* declared that he accepted the same in lieu of all his shares, estates, and rights in or to the slob on the south side of Lough Foyle and in satisfaction of all his rights, claims, and estates to the slob on the south east side of Lough Foyle ; without prejudice, however to such shares of the slob in Lough Swilly which, by virtue of any agreement already made between the parties, should be awarded or allotted to him by way of compensation, or for inequality in value of the slob thereby assigned to him : and Mr. *Dimsdale* covenanted to expend 10,000*l.* before the 31st of October, 1841, in embanking and draining the slob assigned to him ; and that he would, before the 27th of July, 1846, effectually embank and drain said slob : and Mr. *Dimsdale*, in like manner, assigned and released to Mr. *Robertson* that part of the slob in Lough Foyle, lying to the north-east of the Ballykelly canal, and on the south-east side of Lough Foyle, more particularly delineated on the map annexed thereto ; and provisions were contained in the deed, with respect to the premises assigned to Mr. *Robertson*, similar to those inserted therein with respect to the premises assigned to Mr. *Dimsdale*.

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When the last mentioned deed was executed, the relative proportion which the several parts, so partitioned, bore to each other had not been ascertained : but afterwards Mr. *Walker*, the engineer appointed by the Lords of the Admiralty, and by the parties, ascertained the boundary line within which the embankment and reclamation of the slob of Lough Foyle should be made ; which line differed materially from the line described on the map annexed to the deed of the 21st of June, 1841, and cut off much more from the part allotted to Mr. *Dimsdale* than

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On the 29th of November, 1841, Mr. *Dimsdale* filed his original bill against Mr. *Robertson*, and amended the same on the 1st of November, 1842, charging, that the slobs on the north-east side of Lough Foyle, and the slobs in Lough Swilly, would be an insufficient fund for making compensation to him for the inequality in the partition of the slobs on the south-east side of Lough Foyle, and for the annual sum of 700*l.* ; and that it would be impossible for the arbitrators to do him justice in consequence of their confined powers under the deed of submission : and further stating, as the facts were, that Mr. *Smith* having declined to act, Mr. *Dimsdale* had nominated *Jacob Owen*, Esq., the Government engineer in Ireland, as his arbitrator in his place ; and that in reply to a letter from the plaintiff, dated the 1st of October, 1842, Mr. *Tite* said he would be happy to meet Mr. *Owen* in London on the subject of the arbitration : that on the 8th of October, 1842, Mr. *Owen* wrote to Mr. *Tite*, requesting him to nominate a third person as arbitrator, that being the first step to be taken under the deed of submission ; in reply to which Mr. *Tite*, by letter of the 24th of October, stated that he would have great pleasure in meeting him on the matter of the arbitration, it being distinctly provided for that the arbitration was to continue, as it commenced, a London one ; and proposing that the consideration of the relative values of the allotments of the Foyle should be postponed until the then next summer ; and suggested a Mr. *H.* as the person to be appointed third arbitrator : and that on the 26th of October,

1842, the plaintiff was arrested at the suit of the defendant, on foot of the judgment entered pursuant to the warrant of attorney, and was then a prisoner confined for debt : and the bill prayed for a reference to report the sum due to the plaintiff on foot of the annual sum of 700*l.* ; and whether the whole, or any part, and if any, then how much, or what part thereof, should cease to be paid and payable ; and from what time ; and to report what quantity of the slobbs in Lough Swilly should be allotted to the plaintiff in satisfaction of his claim in respect of the annual sum of 700*l.* : and for an account of the difference in value between the several shares of the plaintiff and defendant, taking into account the difference of soils and lands, the facilities for reclaiming them respectively, and the compensations to be made thereout : and that if the defendant's share, under the deed of partition, exceeded the plaintiff's share thereunder, that the Master should report what, in money, was the amount of such excess ; and should, in such case, take an account of the value of the defendant's interest in the Swilly, and the lands on the north-east side of the Foyle ; and if the same should be more than sufficient to make up the deficiency in the plaintiff's share of the Foyle, under the deed of partition, that a sufficiency thereof should be allotted to him as compensation for such deficiency ; and that a commission of partition should issue for the purpose : and in case the defendant's interest in the Swilly, and the lands on the north-east of the Foyle, were insufficient to make up such deficiency, that the defendant might be decreed to make up the deficiency out of his share of the Foyle slobbs, under the deed of partition, without prejudice and regard being had to any contracts *bonâ fide* entered into by the defendant in respect of his share, before the filing of the original bill ; or otherwise to pay the plaintiff in money the deficiency so

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found by the Master : and if the deficiency should be decreed to be made up out of the defendants lands in the Foyle, under the deed of partition, then, that a commission of partition should issue for the purpose.

After the filing of the amended bill of the 1st of November, 1842, Mr. *Dimsdale*, by memorandum of the 27th of July, 1843, agreed to assign and convey his entire interest in the slobs, situate on the south-east side of Lough Foyle, to *Samuel Fleming*, in consideration of the sum of 14,500*l.*, and for other considerations therein mentioned. In July and August, 1843, a correspondence took place between the solicitors of the parties, touching a renewal of the submission to arbitration : Mr. *Robertson* insisting that the arbitration should continue, as it had commenced, a London one ; Mr. *Dimsdale* objecting to an arbitration in England, but offering to refer the questions in the Chancery suit in Ireland to arbitration in the country where the suit was instituted, and the property was situate ; and each party accused the other of delay in proceeding with the arbitration. Not having come to any arrangement on the subject, the solicitors of Mr. *Robertson*, on the 5th of October, 1843, served Mr. *Dimsdale* with a notice, requiring him to appoint an arbitrator in the place of Mr. *Smith* ; and apprising him, that if he did not do so within the time limited by the deed of submission, they would take the necessary steps for appointing one on his behalf. To this Mr. *Dimsdale's* solicitor replied, on the 14th of October, 1843, insisting that it was impossible, except by mutual consent, to carry out the arbitration, as the time limited by the deed of submission had expired without any meeting of the arbitrators thereunder having taken place ; and stating that Mr. *Dimsdale* never would

consent to give vitality to that expired deed, but would proceed with his suit; and cautioning them against naming an arbitrator on behalf of Mr. *Dimsdale*. Notwithstanding this reply, the defendant proceeded in the matter of the arbitration; and, on the 13th of November, 1843, the senior Master of the Queen's Bench, Westminster, appointed *Richard Chamock*, to be umpire for the purposes in the deed of submission mentioned; and, on the 24th of November, 1843, the umpire appointed *Bryan Donkin* to be arbitrator in the place of *George Smith* and *Jacob Owen*; and on the 11th of December, 1843, *William Tite* and *Bryan Donkin* appointed *W. C. Mylin* to be the third arbitrator for the purposes in the deed of submission mentioned. On the same day, the three arbitrators extended the time for making their last award to the 31st of January, 1845. An order for extending the time, made by *Burton, J.* in Chamber, was, by order of the Court of Queen's Bench, Ireland, of the 8th of May, 1844, made on the application of Mr. *Dimsdale*, discharged without costs: and a similar order, made in Chamber by Mr. Justice *Williams*, was, on the 24th of May, 1844, discharged by consent, by the Court of Queen's Bench, Westminster.

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The several matters which occurred subsequently to the amended bill of 1842, were brought before the Court by amendment of that bill, and by the answer thereto. The plaintiff charged that the time limited for making the award had expired without the arbitrators having ever met, or taken any steps therein: and the defendant, by his answer, relied on the provisions in the deed of submission; insisting that the arbitration was still pending, and that the plaintiff was bound to pursue the remedy given him by the

1844. deed of submission, and that he could not resort to a Court of Equity for the relief sought by the prayer of his bill.

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Argument.

The plaintiff at the bar offered to pay the 5250*l.* to the plaintiff.

Mr. *Brooke*, Mr. *Butt*, and Mr. *Armstrong*, for the plaintiff, cited and relied on *Gregory v. Michell* (a); *Gourlay v. The Duke of Somerset* (b); and *Streel v. Rigby* (c); and distinguished *Cooth v. Jackson* (d), *Milnes v. Gery* (e), and *Blundell v. Brettargh* (f), on the ground that the agreement contained in the present deed of submission had been, in part, performed.

Mr. *Moore*, and Mr. *Wright*, for the defendant.

Judgment. THE LORD CHANCELLOR :—

Dimsdale having acquired certain interests in the slobbs of Lough Foyle and Lough Swilly, in October, 1837, entered into a conditional agreement for sale of three-fourths of his interest to *Robertson*. *Robertson* was to provide funds for obtaining an Act of Parliament to enable the parties to reclaim and drain the slobbs; but all such payments were to be the first charge upon all the reclaimed lands and the profits of the undertaking. *Dimsdale* was to be entitled to receive from *Robertson* 700*l.* annually for management; but the same was to be deducted by him out of the profits of the undertaking in the same manner as other advances. An Act of Parliament was obtained in 1838 for draining and embanking the lands. *Dimsdale* and *Robertson* afterwards agreed to divide the property between them equally;

(a) 18 Ves. 328.

(b) 19 Ves. 429.

(c) 6 Ves. 815.

(d) 6 Ves. 34.

(e) 14 Ves. 400.

(f) 17 Ves. 232.

and they acquired the shares of certain other persons who had been named in the Act of Parliament as undertakers with them.

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By deed of November, 1840, the fee in the Lough Swilly slob was conveyed, as to one moiety, to uses to bar down in favour of *Dimsdale*; and as to the other moiety, in like manner, in favour of *Robertson*: and the leasehold interest in Lough Foyle slob was assigned to *Dimsdale* and *Robertson*, in equal shares, as tenants in common. These arrangements, of course, superseded the agreement of 1837, as to proportions; and materially affected the stipulation to allow *Dimsdale* 700*l.* a year for management; for as the parties became entitled to the property equally, and that advance was made to be a charge on *all* the property, the only advantage *Dimsdale* could obtain, if he were entitled still to manage, was the advance of the money in the first instance, as, in the result, the whole was to be a charge on all the property; and the agreement of 1837 provided that all advances by *Robertson* should carry interest.

In this state of circumstances the deed of the 18th of June, 1841, was executed; which, stating the Act of Parliament, and the deeds which had been executed—but not noticing the agreement of 1837—stated, that *Robertson* had advanced and incurred payments, costs, &c., to the amount of upwards of 16,500*l.*, and that *Dimsdale* had secured 5250*l.*, being a moiety of 10,000 guineas, part of that sum, to *Robertson*, by promissory notes and judgments in England and Ireland, and (as appears by the answer) by a mortgage, payable on the 18th of September, 1841, with interest. The deed then recited a claim by *Dimsdale*, by

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virtue of an agreement between the parties (still avoiding any direct reference to the agreement of 1837), to the annual sum of 700*l.* for management; and that all differences between the parties, except those agreed to be referred, had been settled; and that *Dimsdale* had named Mr. *Smith*, of London, his arbitrator; and *Robertson* had named Mr. *Tite*, of the same place, his arbitrator. The deed then provided for the allotment to *Dimsdale* and *Robertson* of portions of Lough Foyle slob, to be held in severalty. The evidence shows that the choice was given to *Dimsdale*, who selected his lot.

The deed then proceeded to give powers and directions to the arbitrators. The arbitrators were, as soon as conveniently might be, and before they proceeded with the reference, to appoint a third arbitrator; and the three for the time being, or any two of them, were to make awards from time to time. First: any two of them for the time being, should, as soon as conveniently might be, award whether the whole or any part of the annual sum of 700*l.* should cease to be payable; and award how much (if any) of the Lough Swilly slob should be given to *Dimsdale* in satisfaction of his claims to that sum. Secondly: any two of the arbitrators were to value the allotments of Lough Foyle; they were to be at liberty to receive evidence of value: and they were to provide for equality of partition out of the other lands not held in severalty; and each party agreed that his allotment in severalty, and the allotment to be made for equality of partition, should be accepted in full satisfaction of all his claims to Lough Foyle slob. The arbitrators were to determine as to the custody of the title deeds; the proportions of compensation payable by each party, under the Act—a most important

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virtue of an agreement between the parties (still avoiding any direct reference to the agreement of 1837), to the annual sum of 700*l.* for management; and that all differences between the parties, except those agreed to be referred, had been settled; and that *Dimsdale* had named Mr. *Smith*, of London, his arbitrator; and *Robertson* had named Mr. *Tite*, of the same place, his arbitrator. The deed then provided for the allotment to *Dimsdale* and *Robertson* of portions of Lough Foyle slob, to be held in severalty. The evidence shows that the choice was given to *Dimsdale*, who selected his lot.

The deed then proceeded to give powers and directions to the arbitrators. The arbitrators were, as soon as conveniently might be, and before they proceeded with the reference, to appoint a third arbitrator; and the three for the time being, or any two of them, were to make awards from time to time. First: any two of them for the time being, should, as soon as conveniently might be, award whether the whole or any part of the annual sum of 700*l.* should cease to be payable; and award how much (if any) of the Lough Swilly slob should be given to *Dimsdale* in satisfaction of his claims to that sum. Secondly: any two of the arbitrators were to value the allotments of Lough Foyle; they were to be at liberty to receive evidence of value: and they were to provide for equality of partition out of the other lands not held in severalty; and each party agreed that his allotment in severalty, and the allotment to be made for equality of partition, should be accepted in full satisfaction of all his claims to Lough Foyle slob. The arbitrators were to determine as to the custody of the title deeds; the proportions of compensation payable by each party, under the Act—a most important

provision; and what deeds, releases, instruments, and acts were to be executed and performed by the parties. Power was given to them to examine witnesses on oath, and also the parties. It is then provided, that the arbitrators for the time being, shall, at any time thereafter, make such award, or, from time to time, make such awards as they shall think proper; with a proviso, that the last of such awards shall be made on or before the 1st of July, 1843, or such other or later time as any two of the arbitrators for the time being, shall appoint: and every two of the arbitrators for the time being, shall have power, from time to time, to enlarge or extend the time as they shall think proper; and that whether such time shall have previously expired or not. Power is then given to the senior Master of the Queen's Bench in England to appoint an umpire, and to fill up the appointment; and he is to act when no two of the arbitrators can agree. This is followed by a proviso, that, at any time before the powers, authorities, covenants, agreements, and provisions therein contained, shall have been fully executed and performed, each party will, in case his arbitrator for the time being shall die, or refuse, &c., to act, appoint another arbitrator within fourteen days; and, in case of neglect, the third arbitrator, or, if none, the umpire, shall make the appointment. Neither party was to bring or prosecute any action at law, or suit in equity against the other, touching the matters thereby referred, or do any act to delay the arbitrators, or bring any action against them. *Robertson* covenants to indemnify *Dimsdale*, upon payment of the 5250*l.*, against all expenses covered by the account. If either party fail to reclaim his allotment before the 27th of July, 1846, the other party may reclaim it and acquire the ownership of it. Finally, the reference may be

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made a rule of the Court of Queen's Bench of England and Ireland.

On the 21st of June, 1821, by a regular deed of partition, the allotments of Lough Foyle slobbs were vested in *Dimsdale* and *Robertson*, in severalty. The deed recites that the partition was to be valid, notwithstanding any inequality whatever in value; and this is regularly provided for by the deed. Mr. *Walker*, the engineer, acting for the Admiralty under the provision in section 95 of the Act, in striking the line of embankment, cut off several thousands of acres from the allotments in severalty of Lough Foyle slobbs; but *Dimsdale's* allotment was lessened in quantity upwards of 2000 acres beyond the loss sustained by *Robertson*, and several hundred acres were cut off the portions provided for equality of partition. *Dimsdale* did not pay the 5250*l.*

Under these circumstances, *Dimsdale* filed the present bill, for a reference as to the 700*l.* per annum; and as to the present value of the several allotments, and for a partition of Lough Swilly slobbs, and of the other part of Lough Foyle slobbs: and if the unallotted portion of the latter and Lough Swilly shall be insufficient for owelty of partition, then, that *Robertson* may make good the deficiency out of his allotment of the Foyle, or by payment in money. The plaintiff did not offer to pay the 5250*l.*; but, after some contest at the bar, he offered, by his counsel, to pay that sum at once to the defendant.

The main ground for equitable relief, beyond the agreement of 1841, is the loss sustained by the plaintiff, by the

line struck by Mr. *Walker*, although the defendant does not admit that the plaintiff's lot is, even now, of less value than his own. But I assume that the plaintiff's allegation would prove to be correct; yet I think that he has no such equity as he claims. For section 95 of the Act expressly provided that no work should be made below the ordinary high-water mark at spring tides without the assent of the Admiralty; and the deed of partition recited that Mr. *Walker* had been appointed, as well by the Admiralty as by the parties, to be engineer, for the purpose of determining the lines of the proposed embankment of Lough Foyle; and he was to determine any dispute between the parties relating to the lines, or any dispute as to the erecting any work below the high-water mark at spring tides without the assent of the Admiralty. The parties, therefore, were fully aware of their rights and liabilities; and with that knowledge they allotted Lough Foyle between themselves, with a provision for owelty of partition out of the unallotted lands, making the partition absolutely binding. I think that they are not now at liberty to disturb that arrangement, and that they must rest content with the actual fund provided for equality of partition. The equity, if it exist, is mutual. If I made a decree, I should be bound to provide relief for the defendant or the plaintiff, whichever should prove to be right in the allegation as to value. But the plaintiff has sold his allotment in the Foyle to a third person who is not a party to the cause; and, although that sale was made pending the suit, yet the Court would not, at the prayer of the plaintiff, who is in prison for debt, proceed to bind the purchaser from him in his absence. It appears to me, however, that the parties have, by contract, restricted their demands for owelty of partition to the properties not the subject of the partition; and the arbitrators

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can, under the deed, give to the plaintiff all that he is entitled to, even if his allegation of value be correct; nor does it appear that there is not sufficient property to answer any demand which the plaintiff can establish.

The partition prayed of the remainder of Lough Foyle and of Lough Swilly seems rather to be with reference to the allotment for equality of partition. After the execution of the deed of arrangement of 1841, by which part of Lough Foyle alone was to be allotted, I do not think that the plaintiff is entitled to demand a partition of the remaining lands, in regard to which the partnership still subsists; but it must remain as a subject to be drained and embanked by the parties in common, subject to the directions of the Act, and of the deed of arrangement. Still the plaintiff would be entitled to the other relief prayed, viz., an account of the value of the allotments and a satisfaction out of the other properties, and an account of what is due for management, unless that right is prevented by the provisions of the deed of arrangement.

To the objection that the plaintiff had not performed his own part of the arrangement, either as to the money or management, it was said that he had been prevented by the conduct of the defendant, who had pursued him into many counties, and who ultimately arrested him, and threw him into prison, where he now lies. But this is not a sufficient answer. The arrest was justified by the neglect of the plaintiff to pay the 5250*l.* He gave security to pay it in four months, and undertook to lay out 10,000*l.* more in a short time. He gave judgment in both countries, so that he assumed to be solvent, and gave, by contract, a ready relief against himself; and he cannot relieve himself

from the performance of his other obligations, because he has not performed that for payment of the money.

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It was then objected that the plaintiff could not sustain the bill, as by the deed of arrangement the matters in question were agreed to be referred to arbitration ; and the time, which had been enlarged, had not expired. In answer to this objection, it was insisted (1) that the time for making an award had passed, and had not been properly extended ; (2) but that if the time were still open, an agreement to refer to arbitration could not be made a defence against a right to sue. It was not denied by the defendant that the suit could be maintained, if the power of the arbitrators had ceased. This is a legal question, depending upon the construction of the deed of arrangement, the particulars of which I have already adverted to ; and I undertook the task of deciding upon it at the request of both parties, without which I should have directed a case to a Court of Law. The facts are, that at the time, viz., the 1st of July, 1843, when the last award was to be made, unless the time was enlarged, there was no person to act in the arbitration but the arbitrator of the defendant. The defendant has never been in default. After that day, an umpire was appointed ; and he appointed an arbitrator for *Dimsdale*, under the power in the deed ; and these two arbitrators appointed a third arbitrator, and all three enlarged the time. The deed expressly authorizes the time to be enlarged *after* the 1st July, 1843, if the arbitrators think proper.

The plaintiff insisted that the time could not be enlarged, as there were not two arbitrators in existence, nor an umpire named, on the 1st of July, 1843 ; and that even if the

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time could, under those circumstances, be enlarged, it could only be where there had been some previous award.

The point is not without difficulty. I have fully considered it, and I think that the time has been duly enlarged. There are no express words to exclude the appointments which were made; and if the umpire and arbitrators were duly appointed, the time was, I think, duly enlarged. The deed gives various powers to the arbitrators, which would require time for their performance; and they are empowered at any time, or from time to time, to make one award or several awards; and then it is provided that the last of such awards shall be on or before the 1st of July, 1843, or before such other time as any two arbitrators "for the time being," shall appoint; and every two "for the time being," have power, from time to time, to enlarge the time, whether such time shall have expired or not. Now, as the time may be enlarged after the day named, the persons who are then arbitrators will be the arbitrators for the time being, competent to do the act; for the words "for the time being" refer, I think, to the time of doing the act, and not simply to the time when it might have been done. There is no provision confining the power to arbitrators actually appointed on the 1st of July, although, of course, such arbitrators could have enlarged the time, and are included within the terms of the deed. The *subsequent* clauses show that the parties meant the arbitration to be proceeded with until the provisions of the deed were fully executed, and for that purpose enabled an arbitrator to be appointed for either party who should neglect to appoint one at any time before the provisions were executed. The intention, I think, is manifest to have arbitrators appointed while there was any act to be done. Now, all the acts re-

mained unperformed, and one of the powers was to enlarge the time. When the time was enlarged, *all* the powers were revived. This being the intention, and there being no sufficient expressions to prevent me from giving effect to that intention, I must declare that the time was duly enlarged. I do not think it material that no award was made before the 1st of July; for the provision in effect is, that no award shall be made after that day unless the time is enlarged. There might have been only one award, if the arbitrators had so thought fit. I may observe that the plaintiff filed his bill in 1841, when the arbitration clauses were in full force; and this suit must be deemed an interruption of the arbitration by the plaintiff himself; and, according to the doctrine in *Morse v. Merest*(a), the plaintiff could not set up an objection which grew out of his own conduct, and which in this case clearly did not exist when he filed his bill. *Morse v. Merest* applied the doctrine to a defendant; but in *Pope v. Lord Duncan*(b), it was considered equally applicable to a plaintiff; and so I consider it. But I need not pursue this point.

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2. It was contended for the plaintiff, that if the time was duly enlarged, yet the reference to arbitration cannot be used as a defence to this suit. As to one subject, the annual sum of 700*l.*, the plaintiff admitted he could not ask for a reference beyond the arrears, if any; for a Master could not be placed in the office of arbitrator and decide whether, having regard to the circumstances, the annuity should determine or not. As to the other relief, there would be no difficulty, if the bill can be maintained. The plaintiff relied upon the case of *Street v. Rigby*(c),

(a) 9 Mod. 56.

(c) 6 Ves. 815.

(b) 9 Sims. 177.

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where, although it was not necessary to decide the point, Lord *Eldon* was of opinion that an agreement to refer to arbitration did not prevent a party from filing his bill.

It is, no doubt, clearly settled, as Lord *Kenyon* said in *Thompson v. Charnock*(a), that an agreement to refer to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction. Lord *Hardwick* so determined in *Wellington v. Mackintosh*(b); yet he said he would not have it understood that such an agreement might not be made and pleaded, but there should be a power to examine witnesses on oath; upon which it was observed by Lord *Kenyon*, and by Lord *Eldon*, that the parties could not confer such a power. Now, in the present case, there is not only an agreement to refer, but arbitrators were actually named; and there is an express covenant not to sue, and an agreement to make the submission a rule of the Court of Queen's Bench of either England or Ireland: and the 3 & 4 Will. IV., c. 42, England, and 3 & 4 Vic. c. 105, Ireland, take away the right to revoke the submission without the leave of the Court, when the arbitrators are appointed by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of Court, and give power to compel the attendance of witnesses, and empower the arbitrators to administer an oath, where, as in this case, it is agreed that the witnesses shall be examined upon oath. These powers place such arbitrators on a different footing, and remove one great objection made to them by both Lord *Hardwick* and Lord *Eldon*. In *Halfhide v. Fenning*(c), where the agreement was to

(a) 8 T. R. 140.

(c) 2 Bro. C. C. 336, 2 Dick. 705.

(b) 2 Atk. 569.

refer to arbitration, and that there should not be any suit at law or in equity, Lord *Kenyon* allowed a plea to a bill before a reference. He held that arbitration should be first resorted to; and if the arbitrators could not determine it, the jurisdiction would be restored. It is said that this decision has been overruled, even by Lord *Kenyon* himself. I think that the reasons for the decision are satisfactory, as applied to the actual case before Lord *Kenyon*; and I am prepared to act upon them, unless the case has been overruled. In *Mitchell v. Harris*(a), where the agreement was simply to refer, and the bill was filed for a discovery in aid of an action, Lord *Rosslyn* supported the bill; but in the course of the argument he distinguished the case before him from that of *Halfhide v. Fenning*. In that case, he said, there was an express agreement that there should be no suit at law or in equity. Parties may so agree; and it is every day's practice that, if they do, they cannot proceed contrary to the agreement. In that case, the covenant would be a bar: here, he said, the only effect of it would be to give damages; but it could not be pleaded in bar of the action. In giving judgment, however, he wholly lost sight of this distinction; and therefore thought *Halfhide v. Fenning* contrary to the case in *Atkins*, and quite inconsistent with the resolution of the Court of King's Bench in *Wilson*, neither of which appears to me to clash with it. The report in *Mitchell v. Harris* in *Brown*, merely makes him say that it was unnecessary to discuss the case of *Halfhide v. Fenning*. In *Tattersall v. Groote*(b), Lord *Eldon*, noticing the distinction in *Halfhide v. Fenning*, thought he did not misconstrue the case of *Mitchell v. Harris*, by stating that the opinion of

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(a) 2 Ves. Jun. 129, 4 B. C. C. (b) 2 Bos. & Pul. 131, 136.

311, S. Sc.

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Lord *Loughborough* did not agree with the doctrine laid down in that case. In *Street v. Rigby*(a), he again seemed to doubt the authority of *Halfhide v. Fenning*, yet thought there would be considerable difficulty upon a negative covenant not to sue, which was the case before Lord *Kenyon*; and he held that a covenant to refer does not amount to an agreement to forbear to sue. In *Waters v. Taylor*(b), Lord *Eldon* considered the opinion expressed by Lord *Kenyon* wrong, as there were against it the concurrent opinions of Lord *Hardwick*, Lord *Thurlow*, Lord *Rosslyn*, and Lord *Kenyon* himself. "As a general proposition, therefore," he added, "it is true, that an agreement to refer disputes to arbitration will not bind the parties, even to submit to arbitration, before they came into Court." But this is a point which Lord *Kenyon* did not decide; and I confine myself to the very point decided by him. I am not aware of any case in which Lord *Kenyon* doubted his own decision. Probably what fell from him in the case in *Term Reports* may have been so considered, although it is confined to a simple covenant to refer. There is no report of any decision of Lord *Thurlow's* impeaching Lord *Kenyon's*. Upon the whole, therefore, I think that *Halfhide v. Fenning* is still law; and the objections to it have probably been occasioned by Lord *Kenyon's* general observations. At all events, I think that an agreement to refer, and arbitrators named, and a covenant not to sue, and a power to make the submission a rule of Court—particularly having regard to the legislative provisions in such a case—do prevent a party from filing a bill, with a view, as in this case, to withdraw the case from the arbitrators. It does not appear to me that because a bill cannot be filed to have arbitrators named, or to supply the place of an

(a) 6 Ves. 821.

(b) 15 Ves. 1-8.

award, it follows that a bill can be filed before an award, in direct opposition to the plaintiff's own covenants.

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In this case, like that of *Waters v. Taylor*(a), the parties have anxiously provided for the reference to arbitration of the several matters in respect to which any difficulty was likely to arise; and, indeed this case goes much further. Lord *Eldon* there, upon an interlocutory application, drove the parties to a reference. Sir *William Grant* afterwards observed, in *Gourlay v. Duke of Somerset*(b), that in some cases, under particular circumstances, as in *Waters v. Taylor*, the Court has said, it will leave the parties to the remedy which they have chalked out for themselves; but there it refused all interposition. He, in that case, substituted the Master for a referee named, as the plaintiff filed his bill for relief, and he could not in that particular have it, except through the machinery of the Court, and the defendant did not raise the objection. The case of *Morse v. Merest*, before Sir *John Leach*, went further. The parties had agreed for the sale of an estate, by one to the other, for twenty-five years' purchase, on an annual value, to be set by three persons named, before a certain day. The seller had prevented the valuation from being made by the day named. The purchaser filed his bill. The Vice-Chancellor held, first, that the seller had, by his own conduct, opened the time; secondly, that although an agreement to sell, at a price to be named by A., could not be enforced at any other price, yet it appearing that the defendant refused to permit the referees to come upon the land, the Court had jurisdiction to remove that impediment, and could decree that the defendant should permit the valuation to be made according to the contract; and if

(a) 15 Ves. 18.

(b) 19 Ves. 431.

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it were so made, then a supplemental bill might be filed for a specific performance upon the terms of their valuation. The Court, therefore, gave its assistance to the referees to enable them to make the valuation, upon which the right to a specific performance depended. I may observe, that *Waters v. Taylor* was ultimately disposed of in a way which does not affect the question before me^(a).

It appears to me, after an anxious review of all the authorities, that I am fully justified in refusing the relief to the plaintiff until the parties have resorted, without effect, to the powers provided by their deeds. The Court would find it difficult to manage these concerns; and it is inequitable for the plaintiff to accept a benefit under the deed of arrangement, and then attempt to evade the rest of the obligations and file a bill for partial relief. His object manifestly was to evade the arbitration in London, and the expense of it, although he had concurred in the appointment of arbitrators residing in the city of London, and to substitute this Court for the arbitrators. If he had succeeded he would have obtained time, and deferred the payment of the costs until the winding up of the cause. But this is a purpose to which the Court cannot be ancillary. As my opinion is against the plaintiff upon all the points, the bill must be dismissed, with costs.

(a) 2 Ves. & Bea. 299.

PEPPER and WIFE, Petitioner, TUCKEY,
Respondent.

(1 *Will. IV.*, c. 60.)

1844.

November 9.
December 2.

BY settlement of the 31st of May, 1842, executed upon the marriage of the petitioners, two sums of money, the fortune of the intended wife (one of which was then invested in Government old Three-and-a-half per Cent. stock, and the other formed part of a larger sum, secured by the bond of *Henry Wood*), were assigned to *Charles C. Tuckey* and *W. J. Pepper*, upon trust to permit *Mrs. Pepper* to receive the dividends and interest for her sole and separate use, but without the power of alienation or anticipation, during her husband's life; and, after his decease, in case she should survive him, to pay her the principal moneys, and all interest due thereon; but, in case she should die in the lifetime of her husband, leaving issue, upon trust to pay the principal sums to the children of the marriage as therein directed; and in case she should die without leaving issue, to such person as she should, by deed or will, notwithstanding her coverture, appoint; and in default of appointment, to her executors, &c. And it was thereby agreed that it should be lawful for the trustees, with the consent, in writing, of the husband and wife, during their joint lives, to invest the trust moneys at interest in Government or private security, and, from time to time, to call in, re-invest, and vary the securities; provided that, if such investments be made on private security, the same should be approved of by counsel for the mutual benefit of all parties to the

The 1 Will. IV., c. 60., was not intended to sanction a trustee resigning his trust rather than do an act which he deems improper.

A trustee in a marriage settlement, refused to join in lending the trust monies, because he disapproved of the security. The wife, pursuant to a power for the purpose, removed him and appointed a new trustee in his place; and the husband and wife then presented a petition under the Act, to compel the old trustee to transfer the funds to the new trustee. The Court refused the application.

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settlement, who should be of opinion that such change of securities, when so made, should be safe, and valid, and good, and for the benefit and advantage of *Mrs. Pepper*: and in case *Charles C. Tuckey* or *W. J. Pepper*, or any succeeding trustee, for the time being, to be appointed as hereinafter mentioned, should depart this life, or be desirous to be discharged from the trusts, or should be about to reside beyond the seas, or should refuse or neglect or become incapable to act in the trusts, before the same should be fully performed or determined, or if, for such or any other cause, during the lifetime of *Mrs. Pepper*, it should seem expedient to change *Charles C. Tuckey* or *W. J. Pepper*, her trustees, then, and in every such case, it should be lawful for her, by deed, to nominate and constitute some other fit and proper person or persons, to supply the place and stead of *Charles C. Tuckey* and *W. J. Pepper*, or such trustee so to be changed as aforesaid; and that immediately after such appointment should be made, all the trust-moneys and securities should be assigned and transferred in such manner that the same should be legally vested in the trustee or trustees so to be appointed, upon the trusts of the settlement.

Mrs. Pepper and her husband being desirous to invest the trust moneys upon a certain private security, applied to the trustees to invest them accordingly; and *Charles C. Tuckey* having declined to do so, *Mrs. Pepper*, by indenture of the 11th of July, 1844, appointed *James Wilcocks* to be a new trustee in the place of *Charles C. Tuckey*, and required *Charles C. Tuckey*, by letter of the 11th of July, 1844, to assign the money secured by the bond, and to transfer the stock to the new trustee jointly with the old trustee.

In reply to this requisition, *Charles C. Tuckey*, on the 19th of July, addressed a letter to Mr. *Pepper*, stating that a legal doubt had been raised as to whether the substitution of a new trustee would, under all the circumstances, free him from responsibility; and that until that was satisfactorily cleared up, he could not transmit the letter of attorney: and further, that he had no desire to remain trustee a day after he was assured of acquittal from all further obligation. Under these circumstances, a petition was presented by Mr. and Mrs. *Pepper*, praying that it might be referred to one of the Masters to inquire and report whether the deed of the 11th of July, 1844, was a good, legal, and valid deed; and if so, that *Charles C. Tuckey* be ordered to transfer the trust funds to the new trustee.

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Mr. *Thomas White*, for the petitioners, relied upon the 10th and 11th sections of the 1 Will. IV., c. 60.

THE LORD CHANCELLOR :—

The object of the petition in this matter is to obtain a transfer of certain stock under the 1 Will. IV., c. 60, s. 10, from a trustee who has declined to transfer the fund to a new trustee. The settlement contains powers of a very unusual character. The property was settled upon the wife for life, without power of anticipation; and after her decease, upon the children of the marriage: but the husband had no interest in the fund; and the trustees were empowered, with the consent of the husband and wife, to lend the trust funds upon private security, provided such

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security were, according to counsel's opinion, safe and valid, and for the benefit of the wife. Then followed a very unusual power to appoint trustees, authorizing the wife to change a trustee whenever she should think proper. It appears that the husband was desirous of lending the money upon a private security, which the trustee did not approve of; and thereupon the husband and wife adopted this scheme: Mrs. *Pepper* exercised the power and changed the trustee, as she had a right to do; and then she and her husband presented this petition under the Act, to compel the old trustee to transfer the fund to the new trustee. The old trustee is not under any disability, nor unwilling to act in the trust: he exercised his discretion and refused to do the act required; stating, however, that he was willing to be discharged from the trust under the sanction of the Court. I do not think that this is a case within the statute. The trustee has only done his duty; he *bonâ fide* refused to lend the trust-money, because he thought the security offered was not a proper one. No order of mine would absolve him from responsibility; for the 10th section of the Act only applies to cases where the trustee really neglects to perform his duty. Here the trustee did not refuse to execute his trust. Even though I may have the power, I think I ought not to exercise it, in order to enable the parties to carry their intention into execution. The trustee has no right to call upon the Court in this summary manner to sanction his transfer of the property: but he has acted properly in not allowing the money to be lent upon any but good security. The Act was not intended to give a sanction to a trustee to resign his trust, rather than do an act which he deems improper. Such a settlement is well calculated to embarrass any trustee attentive to his duty. I refuse the application.

CHAMBERS v. GAUSSEN.

1844.

December 6.

By indenture of lease, dated the 10th of March, 1769, the Honourable *Arthur Dawson* demised the lands of *Creagh Moyola* to *James Boyle*, to hold “unto the said *James Boyle*, his heirs and assigns, from the first day of November last, for and during the natural lives and life of *Alexander Boyle*, *James Irwin*, and *Hugh Boyle*, and the survivors and survivor of them, and for and during the lives and life of such other person and persons as shall be nominated and appointed by the said *James Boyle*, his heirs and assigns, upon the death of any of the persons for whose lives the premises are hereby granted, or upon the death of any such person or persons as shall at any time hereafter be nominated or appointed, for ever, according to the covenants and agreements for that purpose hereinafter expressed;” at the yearly rent therein-mentioned. And *James Boyle* covenanted that he, his heirs and assigns, and their under-tenants on the premises, should, from time to time, and at all times thereafter, during the demise, do suit and service at the Manor Court of Castle Dawson; and would, within six calendar months after the decease of each of the persons whose lives were therein-mentioned, and of each person who should thereafter be nominated or appointed, pay, in the nature of a fine, for each person so dying, unto *Arthur Dawson*, his heirs and assigns, one pepper corn if demanded; with powers of distress and entry, in case the said rent, reservations, services, fines, or any part of them,

A lease was made for three lives, and the survivor of them, and for the lives and life of such other person and persons as should be nominated by the lessee, his heirs and assigns, upon the death of any of the persons for whose lives the premises were granted, or upon the death of any such person or persons as should at any time thereafter be nominated, for ever, according to the covenants and agreements for that purpose hereinafter contained. The lease did not contain an express covenant by the lessor to renew; but the lessee covenanted, within six months after the decease of each of the *cestuis que vietherein*, and of each person who should thereafter be nominated, to pay, in the nature of a fine, for each person so dying, to the lessor and his heirs, a pepper-corn, if demanded: and powers of distress and entry in case the fine should be in arrear, were reserved to the lessor and his heirs: and the lessor covenanted that the lessee and his heirs, paying the rent and fines, might quietly enjoy according to the true intent and meaning of the indenture:—*Held*, that this was a lease for lives renewable for ever.

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should be in arrear. He also covenanted, at all times thereafter to keep the demised premises in repair; and at end or other determination of the presents, to deliver up the premises in good repair: and *James Dawson*, for himself, his heirs and assigns, covenanted with *James Boyle*, his heirs and assigns, that he and they, paying the rents, services, and fines therein reserved, and performing the covenants, agreements, and conditions therein expressed, might quietly enjoy the demised premises without disturbance by the lessor, or those claiming under him, according to the true intent and meaning of the indenture. Livery of seizin was given pursuant to the lease.

This lease had been renewed from time to time; the last renewal being in 1839.

The present bill was filed by *James Chambers*, in whom the interest of the lessee had become vested, against *David Gausсен*, for the specific performance of an agreement to purchase the plaintiff's interest in the lands, which he represented to be an interest for lives renewable for ever. The only question was, whether the lease of the 10th of March, 1769, was a lease for the term of three lives renewable for ever, at a pepper-corn fine.

Mr. *Isaac Butt* and Mr. *William Drury*, for the plaintiff, cited *Sheppard v. Doolan(a)*, and *Taylor v. Pol-lard(b)*.

Mr. *John Brooke* and Mr. *Gausсен*, for the defendant, referred to *Sheppard v. Doolan(c)*.

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THE LORD CHANCELLOR :—

It is conceded that there is no doubt as to what was the intention of the parties; the only question is whether there are words to effectuate that intention. The demise is for three lives, and the survivor, and for and during the lives and life of such other persons and person as shall be nominated or appointed by the lessee, his heirs and assigns, upon the death of any of the persons for whose lives the premises were granted, or upon the death of any such person or persons as should, *at any time thereafter*, be nominated or appointed, *for ever*, according to the covenants and agreements for the purpose thereafter expressed. If the latter words, “according, &c.,” had not been inserted, there is no doubt that, in the consideration of this Court, the instrument would be held to be a lease for lives renewable for ever. There is no magic in words: in such a case the instrument would be a legal demise for the lives named, and an agreement to continue that demise for the lives of all such persons as should for ever thereafter be named by the lessee or his heirs. It is, however, added, that it is to be “according to the covenants and agreements for that purpose hereinafter expressed;” that is, for the purpose of renewing the lease. Now there is no covenant by the lessor to renew; but the lessee covenants that he will, within six months after the decease of each of the persons whose lives were therein mentioned, and of each person who should thereafter be nominated, pay, in the nature of a fine, for each person so dying, a pepper-corn if demanded. That, I think, is the covenant which is referred to. The power of distress given to enforce payment of the fines, shows that it was the inten-

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tion to grant a continuing interest. The payment of the fine, though small, was important, as it preserved the evidence of the tenure ; and the power of distress compelled the tenant, on the fall of each life, to admit the title of the landlord. It was a real transaction for the purpose of maintaining the tenure. Then the landlord covenanted that the tenant, paying the rent, services, *and fines*, might quietly enjoy the premises, “according to the true intent and meaning of these presents.” It has been argued that these latter words do away with the argument to be derived from that covenant ; but it is conceded that the intention was, that the lessee should hold for ever on nominating new lives ; and I think the covenant for quiet enjoyment supports the case rather than weakens it.

Upon the whole case, I am of opinion, that this is a lease for lives renewable for ever. *Taylor v. Pollard* was rather more difficult to deal with than the present case. There was an inconsistency in that case ; for though the *habendum* was to hold for the lives of such other persons as, by virtue of the covenant for perpetual renewal thereafter contained, should, for ever, be added thereto ; yet the covenant actually inserted in the lease was not for a perpetual renewal, but was limited to the fall of the first life. The question, therefore, was, which part of the instrument was to give way ; and the Court, seeing that the intention was to grant a lease for lives renewable for ever, made that part of the instrument which was not consistent with the *habendum*, give way. In *Shepard v. Doolan* the Master of the Rolls was of opinion that the instrument was not a lease for lives renewable for ever ; because it was from the *habendum* only that such an intention could be inferred : I could not accede

to that opinion ; but it became unnecessary to decide the point, as the case was disposed of on other grounds.

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GAUSSEN.
Judgment.

The defendant having declined to take a case to a Court of Law, there was a decree for the plaintiff without costs.

REGINA v. LYNCH.

1844.

December 2.

1845.

January 13.

SCIRE FACIAS on a recognizance. Plea: *nul tiel* record. The writ set forth: "Whereas, on the 28th day of April, A.D. 1838, in the first year of our reign, [at Ballinasloe, in the county of Galway], *M. F.*, of Longfield, in the county of Galway, farmer, *James Lynch*, of Lancaster, in the county of Galway, Esq., and *T. L.*, of Abbeyville, in the said county of Galway, Esq., came before *John Rorke*, [who then and there was] one of the Masters Extraordinary of the High Court of Chancery in Ireland [in and for the said county of Galway, and duly authorized in that behalf], and [then and there] jointly and severally acknowledged themselves to be indebted, &c. [as by the said recognizance of record, and enrolled in our said Court of Chancery, on the 22nd of November, 1838, may appear]:" and then proceeded in the usual form, to aver that the sum of money mentioned in the recognizance had not been paid; and to command the sheriff to make known to the defendant, &c.

A scire facias on a recognizance set forth that on, &c. [at Ballinasloe, in the county of Galway] *M. F.* and two others, of &c., in the county of Galway, came before *J. R.* [who then and there was] one of the Masters, &c. [as by the said recognizance of record and enrolled, &c., may appear].

In the record of the recognizance, the words within the brackets were omitted; but at the foot of the recognizance was this note, signed by the Master—
"Taken and acknowledged before me at Ballinasloe, in the county of Galway aforesaid."

In the record of the recognizance which was produced,

Upon *nul tiel* record pleaded:—*Held*, that there was a variance.

The note at foot is not part of the recognizance.

A case depending at the petty bag side of the Court may be heard and determined out of Term.

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the words above set forth within the brackets, were not inserted ; but at the foot of the recognizance there was this paragraph : “ Taken and acknowledged before me, at Ballinasloe, in the county of Galway, aforesaid, the day and year above written. (Signed), JOHN RORKE, Master Extraordinary for the said county of Galway.”

The case having been called on this day (December 2, 1844), Mr. *Packenham*, for the defendant, objected, that it was not competent for the Court to hear arguments in cases depending at the petty bag side, out of term ; and he referred to 1 & 2 Vic., c. 32, and the 40 Geo. III, c. 39, Ir., authorizing the Law Courts, or Court of Error, to hear arguments out of Term : and to *Jefferson v. Morton(a)*, *Rex v. Daly(b)*, *Rex v. Haine(c)*, and *Ex parte Armitage(d)*, to show the shifts resorted to by Courts in order to comply with the rule ; and he submitted that *Rex v. Barry(e)* was an authority in his favour, as it was certified that although the rules to plead might be entered in vacation, yet they would not run except in term.

Mr. *Napier*, for the Crown.

The common law jurisdiction of the Court of Chancery is incidental to its equitable jurisdiction, and is not limited in its exercise to the period of Term ; *Martin v. Marshall(f)* ; *Rex v. Carey(g)* : and it has been expressly decided that the Court may hold pleas of *scire facias* out of Term ; *Crompt. on Courts*, 42, citing *Bro. Abr. Juris-*

diction, *pl.* 116. The practice has been to hear law arguments out of Term.

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Mr. *Packenham*, in reply.

THE LORD CHANCELLOR :—

Judgment.

The Registrar informs me that the practice has been to mention the case during the Term, and then to hear it argued out of term; and certainly I have acted on that practice. A demurrer in this very case was, I am told, argued upon a former occasion out of term; and no objection was made to that course^(a). The authority in *Bro. Abr.* is decisive, and his language is express on the subject. In England it was lately attempted to be argued that no motion could be heard out of Term, except upon a seal day; but the Chancellor, with the approbation of the other Judges of the Court, has decided, that motions may be made on any day either in or out of Term. There is, properly, a great desire on the part of the Court to accommodate the suitors, and not, without sufficient reason, to impose restrictions of this nature. I therefore have no difficulty in following what has heretofore been the practice. This case has been mentioned in term; but if the parties apprehend any danger, the judgment may be given next Term. In the mean time let the argument proceed.

The parties were proceeding with the argument, when it appeared that, owing to some mistake, the record of the recognizance was not in Court. The case was then ordered to stand over until the next Term.

^(a) See *Regina v. Lynch*, *ante* vol. 1, 462, which was argued on the 19th of June, 1844.

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 January 13.
Argument.

Mr. *Packenham*, for the defendant.

The points relied on are : (1), That there is a variance between the record of the recognizance and the statement of it in the writ, inasmuch as the record itself does not show where the recognizance was acknowledged. (2), That the note, sometimes called the caption, at foot of the record of the recognizance, is no part of the record ; but the writ assumes it to be so, and there is, in that respect, a variance. (3), That the writ vouches the record of the recognizance as ascertaining that the recognizance was taken at Ballinasloe, in the county of Galway ; which the record on inspection fails to do. These points raise two questions : first, what is the true construction of the writ ; secondly, whether the note at foot is part of the recognizance. The true construction of the writ is, that it alleges that the recognizance states in the body of it, the place where it was acknowledged ; and it vouches the record as establishing that fact. It will be contended that the words, “at Ballinasloe, in the county of Galway,” are the averment of the pleader : that cannot be so ; for that allegation is vouched by the recognizance of record ; *Harrington v. Taylor*(a) ; therefore the defendant could not aver against it ; *Com. Dig. Record. E.* The precedents show that the recognizance ought to state, in the body of it, the place where it was taken. *Tidd's Forms*, 103 ; 2 *Ch. Pld.* 5th Ed. 478, 479. *Regina v. O'Leary*(b) is an authority for this objection ; and *Regina v. Hurley*(c) went on this ground, that the words “then and there,” which were annexed to the statement in question, showed that it was an averment of the pleader. Here there is nothing to show that the

(a) 15 East, 378.

(c) 2 Dru. & War. 433.

(b) 2 Dru. & War. 437 (n).

statement of the place where the recognizance was taken, is an averment of the pleader. Secondly, the note at foot is not part of the recognizance. It is not the caption; it is the language of the officer of the Court, not of the conusor: it is not acknowledged by him, but is written after the recognizance has been acknowledged. In *Regina v. Hurley*, the question was raised whether the note at foot formed part of the recognizance; the counsel for the defendant denied that it did; the counsel for the Crown did not assert the contrary; and the Court intimated an opinion that it did not.

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Argument.

Mr. P. Blake and Mr. Napier for the Crown.

Regina v. Hurley establishes that the pleader may introduce into the statement of the recognizance the averment of an independent fact. That is the present case. The *prout patet per recordum* only vouches what is necessary to be vouched by the record. The averment is of a traversable fact, upon which an issue, triable by a jury, might be taken; *Hartley v. Hodgson*(a); *Rex v. Haily*(b). At the utmost, the words are ambiguous; and therefore the defendant should have demurred; *Fletcher v. Pogson*(c). Also, as the conusors are described as of the county of Galway, the words "at Ballinasloe" may be rejected; for it is not necessary to state any other venue than the county. Secondly, the note at foot is part of the recognizance as it appears on record; a recognizance is not a record until it is enrolled; *Glynn v. Thorpe*(d); *Bothomly v. Lord Fairfax*(e). The question, therefore, is, what is it which the recognizance, as enrolled, vouches? Both the recognizance, properly so called, and the note at foot of it,

(a) 2 B. Mo. 66.

(b) 1 Car. & P. 258.

(c) 3 B. & C. 192.

(d) 1 B. & A. 153.

(e) 1 P. Wms. 334; 2 Vern. 750,

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are enrolled ; and together form the record of the recognizance. The caption may be at the foot of the recognizance ; *Anonymous(a)* ; *Anonymous(b)*.

Mr. *Brewster*, in reply.

Judgment. THE LORD CHANCELLOR :—

I am afraid that I must allow this plea. In the case which has been so much discussed, *The Queen v. Hurley*, I took as much advantage as I could of the words, “ who then and there was,” and treated them as an averment of the pleader, in order to support the truth of the transaction ; and no injustice was done thereby to the parties. But now I am asked to go further : for here the supposed record is set forth, stating, that on a given day, at Ballinasloe, in the county of Galway, Mr. *Lynch*, and the other parties, came before one of the Masters Extraordinary of the Court of Chancery, and acknowledged themselves, &c., and I am desired to consider the statement of the place where the recognizance was taken, as an averment of the pleader. In the other cases there was something to lead to the conclusion that the matter in dispute was an averment of the pleader : in them it was stated that the parties came before *A. B.* ; and then came the averment, “ who then and there was” an officer of a certain description. Such a statement has been held to be a substantive averment, in favour of justice ; but the statement here that the recognizance was taken at Ballinasloe, is not any more an averment, than the statement of the day of the month, or year, or reign which precedes it. There is nothing to distinguish that from the other part of the statement, viz., “ that it was taken at

(a) 2 Law. Rec. N. S. 125.

(b) 2 Ir. Law. R. 169.

Ballinasloe, in the county of Galway." I can see nothing which would lead to the conclusion that the latter words are an averment. They form a substantive part of the entire sentence. In the other cases, the words were introduced as a parenthesis. Then there is the other difficulty which has been urged, that the whole statement has been vouched by the recognizance, whereas no such thing appears on the face of the recognizance. It is said that, although the words of acknowledgment, in the note at the foot of the recognizance, are not the caption, and certainly not part of the recognizance, yet, that when the recognizance is enrolled, they do form a part of the record;—that the record is composed of the recognizance properly so called, and the note at the foot of it. But I cannot consider that a mere enrolment of the recognizance alters the nature of the thing itself; the recognizance is not a record until enrolled as such; but the enrolment does not alter its nature or character. Here the reference is, not to the record, but to the recognizance as of record and enrolled. It appears to me that there is a variance between the recognizance set forth in the writ, and the recognizance produced; and that I cannot infer that those words are an averment of the pleader. The plea must, therefore, be allowed.

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THOMPSON v. SIMPSON.

January 16.

Lands were limited to a father for life, with a power of appointment amongst his children; and, in default of appointment, to the children as tenants in common in fee. The father and his eldest son (there being several children) joined in a fine and recovery of the estates; and being advised that the consequence of their act was to vest the fee in the father alone, he, by lease and release, conveyed the lands to a purchaser, and received the entire amount of the consideration-money for his own benefit; the son being present at the transaction, and assenting to the conveyance.

THE Master made his report, pursuant to the decree in this cause(a); and found that *Robert Thompson*, the eldest son of the marriage, did not execute the conveyance of the 4th of April, 1794; and that there was not any appointment executed under the several powers in the articles of April, 1771, contained: that the only other lands mentioned in the articles of the 13th of April, 1771, besides the lands the subject of this suit (viz. Derrycreary), were the moiety of the lands of Killygourdon, and three parcels of lands called Tullynagoan: that two of the parcels of Tullynagoan, containing fifteen acres each, were held under leases respectively made in the year 1770, for three lives, with covenants for renewing the same according to the provisions of the Acts for encouraging the Linen Manufacture in Ireland, at the yearly rents of 13*l.* 7*s.* 9*d.* respectively, the last of which leases would expire on the death of an old life, who was the only surviving *cestui que vie* thereof; and that the third parcel of Ballynagoan contained 20*a.* 1*r.* 15*p.*, and was held at the rent of 17*l.* 17*s.* 0*d.* for three lives, from October, 1770, and would also expire on the death of one surviving *cestui que vie* thereof.

The interest which the son had in the lands, at the time of the conveyance, but not that which he subsequently acquired, is bound by his assent to the conveyance to the purchaser.

If a father, having a power to appoint to a child, without making an actual appointment, concur with the child in making a settlement, which cannot have effect unless through a previous appointment, that very disposition is considered, first, as an appointment to the child, and then as a settlement by the child of the property appointed: but if the intention of the parties be, not to execute the power of appointment, but to operate on the estates in default of appointment, and if the transaction, considered as an appointment, would be a fraud on the power, the Court will not imply an appointment, none such having been actually made.

(a) For the facts and former proceedings in this cause, see 1 Dru. & War. 459.

That the moiety of Killygourdon was held under a terminable lease for lives; and that on the death of *Robert Thompson*, the elder, in 1780, *Henry Thompson* entered into possession and receipt of the rents, as well of the lands the subject of this suit, as of all the before-mentioned lands; and that on the 13th of May, 1788, he sold and conveyed the moiety of Killygourdon to *Joseph Brinny* for the sum of 300*l.*; and that *Joseph Brinny* enjoyed it until the expiration of the lease, which occurred in the life-time of *Henry Thompson*.

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—
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That *Henry Thompson* having become bankrupt in 1801, his interest in the three parcels of Tullynagoan was sold by auction to *Thomas Greer* for 845*l.*, and conveyed to him: and that *Thomas Greer* being dissatisfied with the title, he, by indenture of the 5th of October, 1804, conveyed them to the plaintiff, *Mungo Noble Thompson*, and to his brothers, *Andrew* and *Henry Thompson*, and his sister, *Mary Thompson*; who, by indenture of the 6th of October, 1804, granted them in mortgage to *Thomas Greer*, to secure 800*l.* of his purchase-money: that subsequently, *Mungo Noble Thompson*, by means of his wife's fortune, paid off the mortgage to *Greer*; and by his marriage settlement of the 15th of November, 1810, the said lands were settled, with remainder to the issue of his marriage; and that *Mungo Noble Thompson* agreed with his brothers and sister to purchase their interest in the lands for 200*l.*; and that by indenture of the 11th of December, 1819, in consideration of the 800*l.*, so paid by *Mungo Noble Thompson*, for the redemption of the premises, and of 200*l.*, the amount agreed on as the purchase-money of their interests, *Samuel C. Rowley* and *Mary Rowley*, otherwise *Thompson*, his wife, *Mark Thompson*, *Edward*

1845. *Roper and Prudentia Roper, otherwise Thompson, his wife, Henry Thompson, and Andrew Thompson, conveyed the said lands to Mungo Noble Thompson, his heirs and assigns; and that Mungo Noble Thompson had been, since that conveyance, in possession of said lands.*

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That the sum of 1000*l.*, the only other property mentioned in said articles, besides the aforesaid lands, agreed by said articles to be settled on the issue of *Henry Thompson* and *Letitia*, his wife, never was paid; nor did the said issue, or any or either of them, ever receive any payment on account of said sum.

That *Henry Thompson* died in 1820, and *Letitia Thompson* in 1815, both intestate: that it did not appear that *Robert Thompson*, the eldest son of *Henry* and *Letitia Thompson*, received any part of the purchase-money, no evidence thereof having been given: and that there were two children of *Henry* and *Letitia Thompson*, who died in the life-time of *Robert Thompson*, and soon after their birth; and that there were ten children born issue of said marriage.

The defendant, *Simpson*, excepted to this report, for that the Master reported that *Robert Thompson*, the eldest son of the marriage, did not execute the conveyance of the 4th of April, 1794; whereas he should have reported that, contemporaneously with said conveyance, a recovery was suffered of the lands thereby conveyed, for the purpose of making title to the fee-simple and inheritance thereby conveyed: and that said *Robert Thompson* appeared personally and joined in suffering said recovery; and that he was specially sent for, in order that he should be present when

the conveyance of the 4th of April, 1794, was executed; and that he accordingly came, when so sent for; and that he was present when the conveyance was executed; and that he concurred in the conveyance, and, in testimony thereof, signed the same.

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THE LORD CHANCELLOR was of opinion, that the weight of evidence was, that *Robert Thompson* had executed the deed: but that it was not important to consider whether he had executed it or not, if he were present and assenting to its execution: and he offered the plaintiffs an issue to try, (1), whether *Robert Thompson* had executed the conveyance; and (2), if not, whether he was present and assenting to its execution.

The *Attorney-General*, for the plaintiffs, declined taking the issue.

Mr *Moore* and Mr. *W. Brooke*, for the defendant, *Argument.*
Simpson.

It now appears that, in addition to the lands, the subject of this suit, there were other valuable lands and properties, which were made the subject of settlement by the articles of 1771. If *Henry Thompson* had appointed the lands of Derrycreary to his eldest son, such an appointment would not be illusory; for the other lands and premises would be a fund to go amongst his other issue. The Court may construe the transaction of 1794 as an appointment of Derrycreary, by *Henry Thompson*, to his son, and a conveyance by both to the purchaser. But, supposing that this transaction is not to be considered as an appointment to *Robert*, the son, yet, looking to the value of the entire settled property, it does not appear that Derrycreary was of greater

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value than the proportion of the entire property to which *Robert* was entitled, viz., three-tenths: *Thompson v. Simpson(a)*; *Goldsmid v. Goldsmid(b)*. The assent of *Robert Thompson* to the conveyance of 1794 is as effectual in equity as if he had been an executing party to it: *Wade v. Paget(c)*. The cases of *Norton v. Frecker(d)*, and *Allen v. Allen(e)*, were referred to.

The *Attorney-General* (Mr. *Smith*), and Mr. *Sergeant Warren*, for the plaintiff.

The argument relied on by the defendant does not apply to this case; for the Master has reported that there was not any appointment executed under the powers in the articles of 1771; and no exception has been taken to that part of the report. [THE LORD CHANCELLOR. I am not certain that the question, whether the transaction of 1794 in itself amounted to an appointment, was included in the reference. What do you say to that point?] It does not appear that *Robert Thompson* received any part of the purchase-money; and it appears that the other children did not derive any benefit from the settled property. The authorities are, where there is a *bonâ fide* intention to execute the appointment, the Court will give effect to the informal act of the parties. Here the Court is required to presume that *Henry Thompson* intended a fraud on the rest of his children.

(a) 1 D. & War. 459, 487, 489.

(b) 2 Ha. 187.

(c) 1 B. C. C. 363.

(d) 1 Atk. 524.

(e) 2 D. & War. 307.

THE LORD CHANCELLOR :—

The determination of this question does not depend on any supposed distinction between the actual signature by the son, *Robert Thompson*, and his acquiescence in the deed of 1794. The father was tenant for life, with a power of appointment amongst his children ; and in default of appointment, the estate (according to the decree of the Court) was limited to the children equally, in fee. *Robert Thompson*, the son, was, under those limitations, entitled to a certain interest in default of appointment. The father, instead of executing his power of appointment, joined with his son in a fine and recovery of the estate ; and they were advised, that the consequence of their act was to vest the fee in the father, and to enable him alone to convey the lands to the purchaser. The father, therefore, without requiring the son to join with him in the deed, conveyed the lands, being a portion of the settled estates, to the purchaser, in consideration of the sum of 1000*l.* paid to himself. The son received no part of the consideration : and I consider it indisputable, both from the evidence and the form of the deed of conveyance, that the father received the whole consideration for his own benefit. It is now conceded, that the son assented to the conveyance to the purchaser ; and I shall bind whatever interest he had in the lands at that time by that assent. But it is contended that the conveyance by the father, coupled with the previous transactions, amounted to an appointment of these lands by the father to the son ; and then a conveyance by the father, with the assent of the son, of the lands so appointed to the purchaser. Nothing is more clearly settled than that if a father, having a power to appoint to a child, without making an actual appointment concur with the child in making a

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settlement which cannot have effect, unless through a previous appointment, that very disposition is considered, first, as an appointment to the child, and then as a settlement by the child of the property appointed: and I shall always act upon that rule. But this case is very different. Here it is plain that the parties to the conveyance of 1794 never meant to execute the power of appointment. They were mistaken, it may be, in the matter of law; but they proceeded on a title which was independent of the appointment; and their intention was to act upon the estates which they had in default of appointment. That consideration might not, perhaps, be conclusive on the present question: but what is conclusive to my mind is, that if this transaction amounted to an appointment by the father to the son, as has been argued, then, inasmuch as the father received the whole purchase-money and sold the estate for his own benefit, I am clearly of opinion that that would have been a void transaction in the view of this Court, and could not be carried into execution; for it would be a fraudulent appointment by the father for his own benefit. I am called upon to imply an appointment where none has been made, and where, if the appointment did exist, it would be invalid, and affected by fraud in the contemplation of this Court. But, I repeat, the parties did not mean that the power should be exercised: they put their title extra the power; and, perhaps, for the reason I suggested during the argument, that counsel erroneously supposed that the son was tenant in tail in default of appointment, and that by joining with his father in opening the estate, the fee became vested in the father. I think it clear that the father and son conveyed no more than the father's life estate, and the interest in the estate which the son took in default of appointment. Whatever interest the son had at the time of the convey-

ance to the purchaser, I hold to be bound by the conveyance.

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Mr. *Brooke*.—Or which he subsequently acquired?

THE LORD CHANCELLOR.—No. What you ask for would be difficult to establish. The conveyance of 1794 is by lease and release, which does not operate by way of estoppel.

The *Attorney-General*, and Mr. *Sergeant Warren*, for the plaintiff, asked for an account of mesne rates for six years prior to the filing of the bill; and for the costs of the suit.

Mr. *Moore* and Mr. *Brooke* for Mr. *Simpson*.

THE LORD CHANCELLOR.—I must look at the circumstance, that these articles were drawn so ambiguously as to mislead a learned counsel, and to induce a learned judge, entitled to the highest respect, to form an opinion as to their construction in which I could not agree. They both were of opinion that the father could make a good title to the purchaser. The fault of that ambiguity lies with those under whom the plaintiff claims. As to the mesne rates, I cannot refuse an account for six years prior to the filing of the bill; but the costs stand upon other grounds. The decree establishing the plaintiff's title is in opposition to a former one. Under these circumstances, I shall make my decree without costs.

1845.

Jan. 22, 23.

A lessee of lands demised to him, his heirs and assigns, *pur autre vie*, devised all his real, freehold, and personal property to his wife and children, share and share alike. One of the children who survived the testator, died intestate: *Held*, that his heir-at-law, and not his personal representative, was entitled to his share of the freehold lands.

WALL v. BYRNE.

LUKE WALL being entitled to the lessee's interest in certain lands, held under a lease for lives renewable for ever, in 1831 obtained a renewal thereof; and thereby *Robert Johnston*, in whom the reversion was then vested, demised the lands to him, his heirs and assigns, for the term of three lives therein named, with a covenant for perpetual renewal.

In September, 1832, *Luke Wall* made his will, containing the following devise, which included in it his interest in the lease: "And as for and concerning all my real, freehold, and personal property, which I now possess or am entitled to, I give, devise and bequeath the same and every part thereof unto my dear wife and my children, *Margaret, Anne, Ellen, Mary, Joseph, Luke, Christopher*, and *Valentine*, share and share alike:" and died shortly afterwards.

Mary Wall and *Christopher Wall*, having survived the testator, died intestate and unmarried.

This suit was instituted to administer the assets of *Luke Wall*, and to carry the trusts of his will into execution: and under the decree to account pronounced in it, the Master reported that the shares of *Mary Wall* and *Christopher Wall* in the lands demised by the lease of 1831, descended upon and were vested in *Joseph Wall*, their eldest brother and heir-at-law.

To this report exceptions were taken upon behalf of

some of the younger children of the testator, upon the ground that the Master should have found that, upon the death of *Mary Wall*, her share in the freehold estates, which were estates *pur autre vie*, and devised by the testator to his wife and children share and share alike, without naming any special occupants, vested in her personal representatives. A similar exception was taken to the finding of the Master with respect to *Christopher Wall's* share.

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Mr. *Fitzgibbon* and Mr. *Connor*, in support of the exception, cited *Doe d. Lewis v. Lewis(a)*, and were proceeding to argue the case, when they were stopped by

Argument.

THE LORD CHANCELLOR :—

I cannot permit this exception to be argued. If ever a point was closed by decision it is this ; that where a man has an estate *pur autre vie*, limited to him and his heirs, and devises that estate, by words which, without words of limitation, would pass the *quasi* inheritance—as the words here would—and the devisee dies intestate, the persons to take are the heirs and not the personal representatives of the devisee. The point was so decided in this country many years since(b) ; and that decision has been followed in England ; and many opinions have been given on it. I must therefore decline to hear the question argued ; for I will not be auxiliary to unsettle settled opinions. The case of *Doe d. Lewis v. Lewis* is distinguishable. There the devise was to a man and *his assigns*, which, it was held, did not mean *heirs* : but in this case the devise is in general terms, and in words

Judgment.

(a) 9 M. & W. 662

(b) See *Blake v. Jones d. Blake*, 1 Hud. & Bro. 227, n. ; *Philpot v. James*, 3 Doug. 425.

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which are sufficient to pass the entire interest under the lease. If this had been a fee simple estate, it would have gone to the devisee and his heirs under the terms of this devise. The testator gives all his interest in the lands to his devisees; and both law and good sense require that they should take the same interest which he himself had. It is a settled point, and not now open to be disturbed. It was settled by a case in this country, decided upon great consideration, which has been since recognized and acted on. I shall therefore follow those authorities, and leave the error, if it be one, to be corrected elsewhere.

In Re DUNBAR.

(1 *Will. IV. c. 60.*)

January 25.

Stock was invested in the names of two persons, upon trust, as was alleged, for the petitioners. The only evidence of the trust was the statements in the petition and verifying affidavits, and a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some place unknown, out of the jurisdiction, a petition

was presented, praying that the stock might be transferred to the petitioners; but the Court refused to make the order in his absence, though it was stated that he declined to act, and the other trustee submitted to act as the Court should direct.

THE petition in this matter, and affidavits in support of it, set forth, that in 1834, the sum of 376*l.* 18*s.* 6*d.* was vested by *John K. Dunbar*, the father of the petitioners, in 3 per cent. Consolidated Annuities, in the names of *George Stewart Bell*, *James Nixon*, and *Edward Dunbar*, for the sole use and benefit of his children, the petitioners, *Cecilia Dunbar* and *Henry Dunbar*, upon trust to stand possessed of and manage the same during the minorities of the petitioners, in such manner as they should think fit, for their benefit; and upon further trust, to pay the principal arising from said stock, however invested, in equal shares and moieties, to the petitioners, on their respectively attaining the age of twenty-one years; and as to the interest arising

therefrom, upon trust to pay the same, during the minority of petitioners, to *Jane Mary Dunbar*, their mother, or such other person who should have the actual care and maintenance of them, to go towards their support.

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That *Edward Dunbar*, from the period of that investment until his death in April, 1839, regularly received the dividends on the stock, and paid them over to *Jane Mary Dunbar*, towards the maintenance of the petitioners : and that from the time of his decease, *James Nixon*, another of the trustees, regularly received the dividends, and paid them over in like manner to *Jane Mary Dunbar*, until November, 1843, when the petitioner, *Cecilia Dunbar*, attained her age ; and then paid them to her, for the use of herself and her brother, *Henry*, until December, 1844, when the latter attained his age ; from which time the dividends were paid to the petitioners upon their joint receipt.

That *George S. Bell* some years since left this country in consequence of embarrassments, and was resident in some place abroad, out of the jurisdiction of the Court ; that the petitioners were unable to obtain any information as to his place of residence ; but that, after *Cecilia* and *Henry Dunbar* had attained their age, they caused a letter to be forwarded to him, through a *Mr. Petherick*, informing him of the fact that they had attained their full age, and requiring him to join in transferring the stock to the petitioners ; to which letter *Mr. Bell* returned them no answer, but the petitioners were informed by *Mr. Petherick* that *Mr. Bell* altogether declined to act in the trust. A letter written by *John K. Dunbar* to the solicitor of the petitioners, dated, Paris, 27th of December, 1844, was produced ; in which he stated for his information, as the solicitor of his children,

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Henry and Cecilia Dunbar, "that the sum of 376*l.* 18*s.* 6*d.*, 3 per cent. Consolidated Annuities, vested in the names of *G. S. Bell, James Nixon, and Edward Dunbar*, in the Bank of Ireland, was lodged by me for the benefit of my said children, the interest to be applied for their support during their minority, and the principal to be paid to them on their attaining age. I have no objection, but, on the contrary, am anxious, that they should now receive the amount."

The petition prayed for an order that *James Nixon* do transfer to the petitioners the said stock; and that the Secretary of the Bank of Ireland, or some other fit officer of the Bank, do join in the transfer with *James Nixon* in the name of *George S. Bell*.

Argument. Mr. *H. G. Hughes* and Mr. *Keogh* for the petitioners.

Mr. *Dix* for *James Nixon*, submitted to act as the Court directed; and asked for his costs.

Judgment. THE LORD CHANCELLOR:—

In the absence of one of the alleged trustees, I cannot direct a transfer to be made of stock, where there is no other evidence of the trusts upon which, it is said, it has been invested, than that which has been given in this case. I ought not to assume such a jurisdiction; and shall therefore make no order upon this petition, but leave the parties to act as they may be advised. Nor can I make any order respecting the costs of the trustee. He may get them out of the dividends if he pleases.

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BY the 26 Geo. III. c. 57, it is enacted, that it shall be lawful for His Majesty, his heirs and successors, to grant, under the Great Seal of this kingdom, for such term, not exceeding twenty-one years, and under such restrictions, conditions and limitations as to him or them shall seem meet, from time to time, and when and as often as he or they shall think fit, one or more letters patent to one or more person or persons, for establishing and keeping one or more well regulated theatre or theatres, play-house or play-houses, in the City of Dublin, and in the liberties, suburbs, and county thereof, and in the County of Dublin: and (sec. 2) "that from and after the 1st of June, 1786, no person or persons shall, for hire, gain or any kind of reward whatsoever or howsoever, act, represent or perform, or cause to be acted, represented or performed, any interlude, tragedy, comedy, prelude, opera, burletta, play, farce, pantomime, or any part or parts therein, on any stage, or in any theatre, house, booth, tent or other place within the said City of Dublin, or the liberties or suburbs or county thereof, or within the County of Dublin, under any colour or pretence whatsoever, save and except in such theatre or play-house as shall be so established or kept by letters patent as aforesaid; under the penalty of forfeiting the sum of 300*l.* sterling for every such offence," one moiety

By the 26 Geo. III. c. 57, s. 1, the Crown was authorized to grant letters patent for establishing and keeping a theatre in Dublin; and by sec. 2, it was enacted, that no person should for hire, act any play in any theatre in Dublin, except in such theatre as should be so established by letters patent; under the penalty of forfeiting 300*l.* for every such offence: to be sued for by the common informer.

Under this Statute the Crown granted letters patent to *H.*, authorizing him, during a certain term, to keep a theatre in Dublin; and His Majesty prohibited and forbid all persons whatsoever, during the term, that they presume to keep open, in any manner, any theatre in Dublin, and therein to act any play, unless they should be thereunto authorized by His Majesty.

Held, that the patentee could not maintain a bill for an injunction to restrain unauthorized persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted.

Such a bill can only be maintained upon the ground of interest in the plaintiff; and unless he can sustain an action in the case, the injunction cannot be supported.

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to be paid to the Governors of the Lying-in Hospital, the other to the person who should prosecute or sue for the same: and it was provided (sec. 3) that nothing in the Act contained should extend to any entertainment or exhibition then or thereafter established upon the premises belonging to the Lying-in Hospital, so long as the profits arising from the same should be applied to the support of that charity, so that neither regular tragedy or comedy should be exhibited therein: and (sec. 6) prosecutions under the Act were limited to six months after the offence committed.

Henry Harris having, in the year 1820, erected a theatre in Hawkins'-street, in the City of Dublin, called "The Theatre Royal, Dublin," applied for letters-patent pursuant to the provisions of the 26 Geo. III. c. 57, allowing him to perform every species of dramatic representation in that theatre; and accordingly, by letters patent of the 15th of May, 1820, issued under the authority and reciting that Act, his late Majesty, King George IV., for himself, his heirs and successors, granted unto *Henry Harris* and his assigns full power and authority to establish and keep a theatre within the City or County of Dublin, and therein, or in one of the theatres in the City of Dublin, at all lawful times, except as therein excepted, publicly to act, represent and perform, or cause to be acted, represented and performed, all interludes, tragedies, comedies, preludes, operas, burlettas, plays, farces, pantomimes, or any part or parts thereof, of what nature or kind soever, decent and becoming, and not profane or obnoxious—to hold for the term of twenty-one years from the date thereof: and His Majesty did, by the said letters patent, for himself, his heirs and successors, strictly prohibit and forbid all

persons whatsoever, during the time thereinbefore limited, that they or any of them presume to erect, build or keep open, in any manner whatsoever or howsoever, any theatre or stage whatsoever within the City or County of Dublin, and therein or thereon to act, represent or perform any interlude, tragedy, comedy, prelude, opéra, burletta, play, farce, pantomime, or any part or parts thereof, unless they should be thereunto duly authorized or appointed by His Majesty, his heirs and successors. These letters patent contained the usual clause, that they should be construed in the most favourable form for the benefit of the grantee and his assigns.

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By other letters patent of the 5th of October, 1829, after reciting the 26 Geo. III., c. 57, and the letters patent theretofore granted to *Henry Harris*, His Majesty King George IV. granted to *Richard Talbot Jones* and *Charles H. Jones*, and their assigns (in trust for themselves and certain other persons therein named), full power and authority to establish and keep a theatre within the City or County of Dublin, and therein to act, represent or perform all concerts, feats of horsemanship, fantoccini, ballets, melodramas, pantomimes, operatic pieces, and such other exhibitions as were usually given at certain theatres therein particularly named (being the minor theatres in the City of London); prohibiting, however, the performances of the regular drama therein, the liberty of which performance had been (as the said letters patent stated) theretofore granted to *Henry Harris*; to hold for the term of twenty-one years from the date thereof. These letters patent contained a prohibitory clause, similar to that in the letters-patent to *Henry Harris*, but confined to such

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By indenture of the 14th of February, 1822, *Henry Harris*, in consideration of the sum of 10,000*l.*, granted two annuities, of 700*l.* and 300*l.*, to *George Bicknell*, for the term of ninety-nine years, provided eight lives therein named should so long live; and he thereby assigned the theatre to *William Moore* and *W. L. Bicknell*, and their heirs, upon trust, during the term of 99 years, to pay out of the rents thereof the said annuities: and by the same deed *William Harris* also assigned the letters patent to the same trustees, and covenanted, that before the expiration thereof he would use his best efforts to obtain a renewal thereof: and the trustees were empowered to sell the theatre, or letters patent, in case the annuities should be in arrear for forty days.

S. Beezley was afterwards appointed a trustee in the place of *William Moore*, pursuant to a power for that purpose contained in the annuity deed; and on the 9th of December, 1838, other letters patent, of the like tenor as those of May, 1820, were granted to *S. Beezley* and *W. L. Bicknell*, for the term of twenty-one years; and the former letters-patent were surrendered.

The annuities having fallen into arrear, articles of agreement, dated the 27th of August, 1839, were executed between the trustees of the deed of 1822, and the several persons interested in the annuities thereby granted, of the one part, and the plaintiff, *John W. Calcrafft*, of the other part; whereby the parties of the first part agreed to sell, and *John W. Calcrafft* agreed to purchase, as and from the

29th of October, then next, all the estate, right and interest of the parties of the first part in the theatre, letters patent, scenery, dresses and decorations, for the sum of 12,000*l.*, payable by instalments as therein mentioned. And it was agreed, that until the plaintiff should be entitled to his purchase deeds, he should be deemed and considered a tenant of the theatre, &c., at the rents therein mentioned ; and that upon payment of the 12,000*l.* and interest, the plaintiff should be entitled to an assignment of the theatre, letters patent, &c., and to have delivered to him the title deeds and letters patent, and any renewal thereof that might in the mean time be granted.

Previous to the execution of these articles, *John W. Calcraft* had been in the possession of the theatre as tenant to the trustees of the deed of 1822 ; and he continued in the exclusive possession thereof, under the articles, and paid 5000*l.*, part of the purchase money. The remainder was still due ; and no conveyance of the theatre or letters-patent had been, as yet, executed to him.

The letters-patent so granted to *Henry Harris*, and the renewal thereof, and the letters patent granted to the Messrs. *Jones*, were the only letters patent granted under the 56 Geo. III. c. 57.

In October, 1835, one *W. Last* opened a theatre in the City of Dublin, called the Adelphi Theatre, and performed therein French plays, operas and operatic pieces : whereupon the plaintiff, *John W. Calcraft*, brought an action of debt for penalties under the Statute against him, and recovered judgment for 300*l.* ; which he was unable to levy, as the defendant in that action left the country upon the verdict being given against him.

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In August, 1833, *Richard T. Jones* and *Charles H. Jones* granted to *John* and *James Calvert*, the proprietors of Abbey-street theatre, the benefit of the patent of 1829, for the term of two years : upon the expiration of that term, *James Calvert* enjoyed the benefit of that patent under an equitable contract entered into between him and the Messrs. *Jones*, which continued until August, 1839. Under colour of these letters patent, *James Calvert* performed plays of the regular drama, at his theatre in Abbey-street ; and *John W. Calcrafft*, in May, 1839, recovered judgment against him in an action for penalties, which, however, he was not able to levy, by reason of *Calvert's* embarrassed circumstances.

In August, 1835, *Richard T. Jones* (*Charles H. Jones* being then dead), agreed to grant all his right under the patent of 1829, to *James Calvert*, the younger, for the term of five years, from the 10th of August, 1839, at the yearly rent of 255*l.*

In 1843, there being a large arrear of rent then due, *Richard T. Jones* brought an action against *James Calvert* for the recovery thereof ; and obtained a verdict in the sittings after Michaelmas Term, 1843. After notice of trial in that action had been given, and before the cause came on to be tried, *James Calvert* confessed a judgment to the defendant, *M. West* (collusively, as it would appear, to deprive *Richard T. Jones* obtaining any fruits from his action), upon which *West* immediately issued execution ; and on the 6th of January, 1844, the sheriff sold the scenery, dresses, &c., of the theatre to *J. Berry*, and a few days afterwards sold *Calvert's* interest in the plot of ground, and the buildings erected thereon, on the north side of Abbey-street (the

theatre), to *M. West* and *J. Berry*, and conveyed the same to them by indenture of the 25th of January, 1844. Upon the sale of the scenery being made, *James Calvert* wrote a letter to *J. Berry*, consenting that *Berry* should keep the theatre open, and the company employed, and have the use of the theatre until the same should be finally disposed of; he discharging the expenses in the mean time; and by another letter from *James Calvert* to *M. West* and *J. Berry*, dated the 15th of January, 1844, *James Calvert* consented that *West* and *Berry* should have the use of the patent assigned to him by Mr. *R. T. Jones*, and all the privileges of performance attached thereto, "upon the terms already defined and settled between us, during my term."

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On the 22nd of January, 1844, *James Calvert* was arrested for debt; and afterwards petitioned to be discharged as an insolvent. He was opposed by *R. T. Jones*; and the result of the opposition was, that the Court ordered *James Calvert* to be discharged; and at the same time ordered him to surrender to *R. T. Jones* the agreement of August, 1839, for the use of the patent; which he forthwith did in open Court, in the presence of *M. West* and *J. Berry*.

Before and after the discharge of *James Calvert*, applications were made by *J. Berry* and *M. West* to *R. T. Jones* for a renewal of the term for holding the theatre under his patent; which, however, were not acceded to: and by articles of the 29th of June, 1844, *R. T. Jones* agreed to grant to *J. C. Joseph* the benefit of his patent: under which agreement *Joseph* opened the Victoria Theatre in Brunswick-street.

J. Berry made the before-mentioned purchases in trust

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for *M. West*, and afterwards assigned all his interest therein to him ; and *M. West* having caused several tragedies and plays of the regular drama to be performed in the Abbey-street Theatre, the plaintiff, *John W. Calcraft*, filed the present bill against him and against *George Gray*, an actor, and *M. A. Tyrell* and *E. Makenzie*, two of the actresses at that theatre for an injunction to restrain the defendants from acting, representing or performing, or causing to be acted, represented or performed, for hire, gain, or reward, any interlude, tragedy, prelude, opera, burletta, play, farce, pantomime, or any part or parts therein, on any stage or in any theatre within the City of Dublin, under any colour or pretence whatsoever, save and except in some theatre or play-house which should be established or kept by letters patent as aforesaid, pursuant to the Statute : and for the costs of the suit.

The bill was afterwards amended by striking out the names of the female defendants as parties thereto.

The plaintiff moved upon the bill, verified by affidavits, for an injunction until answer or further order. The Master of the Rolls did not grant the injunction ; but put the defendants under terms which provided for the speedy determination of the suit.

Argument.

Mr. Brewster, *Mr. Monahan*, *Mr. Creighton*, and *Mr. Woodroffe*, for the plaintiff.

The principal question is, whether this Court has jurisdiction to grant the relief prayed. It was contended by the defendants, on the motion for the injunction, that it was the common law right of every subject to open a theatre, and therein to act plays for hire. There is no authority for that position : and the language of the Statute, " that it

shall be lawful" for the Crown to grant letters patent authorizing stage performances, and the cases lead to an opposite conclusion: *Jacob Hall's case*(a); *Rex v. Higginson*(b); *Sir Anthony Ashley's case*(c); Vin. Abr. Riots, A 8; Dalt. Just. c. 136. [THE LORD CHANCELLOR. These were cases of nuisance: but supposing that an indictment would lie against stage players, does that give jurisdiction to this Court to grant relief.] It assists my argument to show that, unless licensed by the Crown, it is unlawful to represent stage performances for hire. It will be said that where a new offence is created by Act of Parliament, and, in the same section, a penalty is imposed upon the party committing it, the penalty is the only sanction, and that an indictment will not lie; 1 Russell on Crimes, 49: but that does not apply to a case where the act is an offence at common law, and a penalty is imposed by Act of Parliament. So where a Statute prohibits an act, and imposes a penalty, yet a party may be indicted for the commission of the act: *Rex v. Harris*(d). The present case comes within the principle of the decisions on the Statutes against gambling; which is an offence created by Statute and sanctioned by a penalty: and yet Courts of Equity entertain a jurisdiction to restrain a party suing upon a gambling security. The jurisdiction of the Court is not taken away by the special enactments of a Statute providing a remedy in a particular case: *The Attorney General v. Aspinall*(e); *The Attorney General v. The Corporation of Poole*(f). But I would put this case rather upon the right or interest of the plaintiff, derived under his patent, than on the defendant's violation of the criminal law. If the patent confer a right on the plaintiff, there is no doubt

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(a) 1 Mod. 76.

(b) 2 Burr. 1232.

(c) 1 Roll. R. 307.

(d) 4 T. R. 202.

(e) 2 M. & C. 613.

(f) 4 M. & C. 17

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that the Court will restrain an infringement of that right. It is like the case of a fair or market: the Court will restrain the opening of a new market to the injury of the old one: *Ex parte O'Rielly*(a); *Mosley v. Walker*(b); *In re Islington Market Bill*(c). The jurisdiction to restrain the infringement of a patent is undoubted, though a special remedy is provided by the Act: *Sheriff v. Coates*(d). Here the plaintiff has a clear right under the Statute and his patent to act plays. The action for the penalty is given to the common informer; no remedy is expressly given by the Act to the patentee; and as there cannot be a right without a remedy, the inference is that the patentee may maintain an action on the case for an infringement of his right. In 1 *Roll. Abr., Action sur case*, M. 17, it is said that if the king grants that no one shall use such a thing but the grantee (supposing this to be a good grant), and another uses it, the grantee may have an action on the case against him. That is precisely the present case. Such an action was held to be maintainable under the Copyright Acts, though it was argued that the only remedy was an action for the penalty: *Beckford v. Hood*(e). [THE LORD CHANCELLOR. There the Statute gave the author a property in the publication of his work: here the question is, whether the patentee has a property or license. Suppose the case of a license to open a public house; could the licensee maintain an action on the case against another person for opening an unlicensed public house near him?] That is a right of a different nature; and even in such a case it is far from being clear that the licensee could not maintain the action. It is difficult to distinguish this case from that of the grant of a fair or a market, which, though

(a) 1 Ves. Jr. 112 n. See p. 140.

(d) 1 R. & M. 159.

(b) 7 B. & C. 40.

(e) 7 T. R. 620.

(c) 3 Cl. & Fin. 513.

only the grant of a license, yet becomes property capable of transmission. *Bartlett v. Vinor*(a); and *De Begnis v. Armistead*(b) were also referred to.

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Mr. *Pigott*, Mr. *Napier*, and Mr. *A. Vance*, for the defendants.

The sole question is, whether this is property or license. The plaintiff cannot maintain the bill unless he can maintain an action on the case for the infringement of his patent right. Such an action was never heard of. *Beckford v. Hood*(c) was a very different case from the present: the Statute 8 Anne, c. 19, E., gives to the author a property in the publication of his work; and the penalty is imposed by a subsequent section. The action there was brought upon the section which gave the right. Here the second section of the Statute does not confer any right: it merely prohibits all theatrical representations within the city or county of Dublin, except in such theatre as should be established by letters patent, under a penalty of 300*l*. The plaintiff, to support his case, must contend that, by the first section of the Act, power was given to the Crown to annex to the letters patent granted to *Henry Harris*, the prohibition contained in them. The *placitum* in Roll. Abr. is not an authority for this bill; it is put doubtfully, by *Rolle*, who cites the case of *Monopolies*(d) for it. In that case Queen *Elizabeth*, by letters patent, granted to *E. Darcy* full power, license and authority, to import playing cards into the realm, and sell them within the same; and that he should have and enjoy the whole trade of all playing cards: and further, that he, and none other, should have the making of playing cards within the realm: to hold for

(a) Carth. 252.

(c) 7 T. R. 620.

(b) 10 Bing. 107.

(d) 11 Rep. 84.

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twenty-one years after the expiration of a former grant of the like nature: and, by the same letters patent, the Queen commanded that no person, besides the grantee, should bring or make any playing cards within the realm, during the term, upon pain of fine and punishment for contempt. *Darcy* brought an action on the case against a person who had sold playing cards made within the realm. The Court considered, first, whether the grant of the sole right of making playing cards within the realm was valid; and they held it was not: secondly, whether the dispensation to have the sole importation of foreign cards was good, it being contrary to the 3 Ed. IV., c. 4; and they held it was void: but added, that admitting that such dispensation was good, yet the plaintiff could not maintain an action on the case against those who imported foreign cards, but that the remedy which the 3 Ed. IV. gave ought to be pursued. The position laid down by *Rolle* assumes that the restriction in the letters patent was valid: but we contend that neither by the common law, nor by this Act of Parliament, is the king empowered to impose the prohibition contained in these letters patent. The preamble of the Act shows that theatrical representations are not illegal by the common law; and 1 *Hawk. Pl. Cr.* 693 is to the same effect: and the Statute does not expressly confer upon the Crown the right of prohibiting them. The question, therefore, comes to this: does the power given to the Crown to grant letters patent authorizing such representations, imply a power to prohibit all other like performances which are not licensed. The common law in England upon this subject is the same as that in Ireland. The 39 Eliz. and 12 Anne, s. 2, c. 23, by which players are classed among rogues and vagabonds, and are punishable as such, are prohibitory Statutes; which would be unnecessary, if the representation of stage performances

was illegal at common law. The 10 Geo. 2, c. 28, which, in some measure, relieved players from the penalties imposed by the former Acts, provided, that persons acting in any place where they are not legally settled, and without the authority of letters patent or license from the Lord Chamberlain, shall be deemed rogues and vagabonds within the meaning of the 12 Anne: and the second section enacts, that if any person, having or not having a legal settlement, shall, without such authority or license as aforesaid, act, represent or perform, for gain, any interlude, tragedy, comedy, play, &c., he shall, for every such offence, forfeit the sum of 50*l.*; and in case that sum be paid, he shall not be subject to the penalties inflicted by the Act of Anne. Now there have been, since the time of Charles II., patent rights to hold theatres; the patentees under those patents have had a property (if it be property) in the right to act plays; but though that right has been frequently invaded, there is no instance of the patentees having ever attempted to obtain redress by an action on the case, or by an injunction; but there are many instances of proceedings by indictment for a nuisance, and by action for penalties; as in *The King v. Betterton*(a); *Rex v. Higginson*(b); *Archer v. Wallingrice*(c); *Gregory v. Tuffs*(d); and *Gregory v. Tavernor*(e). This total absence of authority is conclusive against the right of the plaintiff to the relief sought. The offence created by the Statute is a new one; and the particular remedy given should have been pursued: *Rex v. Robinson*(f); *Millar v. Taylor*(g); 2 *Hawk. P. C.* 289; *East India Company v. Interlopers*(h).

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(a) Skin. 629.

(b) 2 Burr. 1232.

(c) 4 Esp. 186.

(d) 6 Car. & P. 271.

(e) 6 Car. & P. 281.

(f) 2 Burr. 799, 803.

(g) 4 Burr. 2303, 2323.

(h) 2 Ch. Ca. 165.

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The plaintiff has not brought the necessary parties before the Court. The trustees, in whom the legal interest in the patent of 1839 is now vested, are not parties to the suit. They are not trustees for the plaintiff alone; for the purchase-money has not yet been paid off. The Attorney-General also should have been a party to the suit.

The *King v. Neville(a)* was also referred to.

Mr. *Monahan*, in reply.

As to the objection of want of parties, it does not apply. It has been held that, where the title is clear, an assignee by parol, of a copyright, may maintain a bill for an injunction without making the assignor a party to the suit: *Sweet v. Cater(b)*; *Hodges v. Welsh(c)*; *Long v. Oxberry(d)*; *Const v. Harris(e)*: for the Court, if it be necessary to try the right at law, will put the defendant under terms to admit that the legal title is in the plaintiff. In this case also, the plaintiff, until payment of the purchase-money, is tenant of the theatre to the trustees. [THE LORD CHANCELLOR. The cases cited came before the Court upon applications before the hearing.] This objection has not been taken by the answer; and, if necessary, the Court will permit the bill to be amended. As to the legality of the restriction in the letters patent, whatever doubt may exist under the English Statute, there can be none under the Irish Act, the first section of which authorizes the Crown to grant to the patentee the right of exercising this trade; and the second section of which makes it illegal for any person, save the patentee, to exercise the

(a) 1 B. & Ad. 489.

(b) 11 Sim. 572.

(c) 2 Ir. Eq. R. 266

(d) Godson on Pat. 429.

(e) Tur. & R. 496.

same trade. The defendants say, that though their act is illegal, yet as the Statute imposes a penalty, no person, though injured in his private circumstances, has a right to have recourse either to a Court of law or equity for redress for that injury; but the case comes within the authority cited from *Roll. Abr. Action sur case*, M. 17. Here the very circumstances exist which *Rolle* assumes; for the Act of Geo. III. not only makes it illegal for any person but the patentee to represent or act plays, but it also empowers the Crown to grant a patent, authorizing the patentee to represent plays. Such right is not conferred on the Crown by the corresponding English Statutes. *Sheriff v. Coates*(a); *Wilkes v. The Hungerford Market*(b); and *Spencer v. The London and Birmingham Railway Company*(c), are authorities that, notwithstanding the peculiar sanction given by the Statute, the party grieved has also his remedy. It is difficult to say that the patent right is not property, it being transmissible like other property.

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Mr. *Pigot*, for the defendants, on this day (February 7) stated that he would not make any objection to the form of the pleadings; and that the defendants submitted to have the legal questions decided by the Court.

THE LORD CHANCELLOR.

In this case the owner of the patent from the Crown seeks for an injunction against the defendants for infringing

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(a) 1 R. & M. 159.

(c) 8 Sim 193

(b) 2 Bing. N. C. 281.

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his sole right to perform the regular drama. Several objections in point of form were raised, but they were ultimately abandoned, and I was requested to decide the abstract question of right to maintain the bill, and not, in the first instance, to put the plaintiff to try his right at law to maintain an action on the case.

The rights of the parties depend on the 26 Geo. III., c. 57, by which a power was given to the Crown to grant letters patent for keeping a theatre or theatres in the City of Dublin, and in the County of Dublin. And by the second section no person is, for hire, to perform any play, &c., in any theatre within the city or county, save in such theatre as shall be so established by letters patent, under a penalty of 300*l.* for any offence, to be recovered at law by any person who shall sue for the same. The prohibition and penalty, it will be observed, are in the same clause. This prohibition, would, in the first instance, operate against all the world; and a breach of it could not be prevented by this Court, but would subject the offending parties to the heavy penalty imposed by the Act. So that there is no original jurisdiction.

It is contended for, on the part of the plaintiff, that he has a property in the patent, which entitles him to an injunction, and that he could bring an action on the case. On the part of the defendants it is stated, and not denied, that no such action has ever been brought. The plaintiff relies upon the prohibition in the patent against other persons performing: but this appears simply to confine the authority to the patentees; for the Act of Parliament itself contains the prohibition, and restricts all persons but the patentees from keeping a theatre.

The plaintiff's counsel were not agreed whether he could maintain the bill unless he could maintain an action on the case. In my opinion he can only maintain the bill upon the ground of interest: unless, therefore, he could sustain an action on the case, the injunction, I think, cannot be supported. For the prohibition is general; and the aid of this Court is not required to give effect to it. After the patent was granted, the patentee was no longer subject to the prohibition: he was excepted out of it; but it remained in force as to the rest of the world: and the remedy for a breach was not altered, although it was restricted by the authority given by the patent. The patentee, after the grant, had, as a person who could sue for the penalty, just the same right to punish an infringement of the prohibition as he had before, but no higher or greater. The public had still the same security under the Act of Parliament.

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In favour of the plaintiff's right to maintain an action on the case, 1 *Roll. Abr.* 106, pl. 17, was relied upon. That and pl. 16 are the rules extracted by *Rolle* from the *Case of Monopolies*, in 11 *Rep.* 84*b*. The Statute 3 Edw. IV., c. 4, prohibited the introduction into the realm of foreign playing cards, and imposed a penalty for doing so. The Queen granted, by her letters patent, an authority to a person to import such cards, and prohibited all others from importing any. It was held that this grant was void; but the Court held that, *admitting that such grant or dispensation was good*, yet the patentee could not maintain an action on the case against those who import any foreign cards; but the remedy which the Act of 3 Edw. IV., in such cases, gives, ought to be pursued. This is correctly stated by *Rolle* in pl. 16. In pl. 17, he puts the case of an exclusive grant by the Crown (admitting it to be good) reserving a

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rent: in which case the grantee may, as he collected from the case in *Coke*, maintain an action on the case. The latter was said to be this case. But in the instance thus put, the Statute is excluded, and the whole rests on the assumed power of the Crown to grant an exclusive right; whereas the present is like the principal case, as stated in pl. 16; for the Statute prohibits the Act under a penalty; but it gives the power to the Crown, which, in the *Case of Monopolies* was assumed to be in the Queen, for the purpose of deciding the point.

Beckford v. Hood(a) decided that an action on the case could be maintained by an author for piracy, whilst his exclusive right of property remained, notwithstanding the penalty imposed by the Statute 8 Anne, c. 19; but that was decided upon the right of property, the limited remedy, and the general intention of the Act; and it does not, I think, rule this case. In *Sheriff v. Coates*(b), which was much relied upon, where an injunction was granted, the Act of Parliament which conferred the right, gave to the proprietor an action on the case for a piracy; and that very provision was relied upon against the right to an injunction.

The result of my consideration of the Act of George III., and of the authorities bearing upon its true construction, is, that the plaintiff has only, in common with the rest of Her Majesty's subjects, a power to sue for the penalty as a common informer; that he has not any right of property under the license which would enable him to maintain an action on the case, notwithstanding the remedy given by the Act; and that this Court has no power to grant an injunction. The bill, therefore, must be dismissed with costs.

(a) 7 T. Rep. 820

(b) 1 Russ. & M. 159.

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Feb. 7, 22.

WILLIAM Baron Annesley and Francis Annesley, Esq., being seised, as tenants in common, in fee, *inter alia*, of the lands of Gibbstown, Troystown, and Donagh-
 Tenant in fee borrowed money; to secure the payment whereof, with interest, he confessed

a judgment in double the amount, and put his creditor into the receipt of a fee-farm rent, which was equal in amount to the annual interest: and afterwards devised all his estates to *A.* for life; remainder to *B.* for life; remainder to the first and other sons of *B.* in tail. *A.* died in 1802; the full amount of the judgment being then due to the creditor, who had not been paid interest since 1786. *B.* died in 1824, never having received any part of the fee-farm rent; but his executors were paid twenty-one and a half years' arrears of the rent. *B.* having, in 1824, paid off the judgment, and taken an assignment of it to a trustee for himself, *Held*:—that his executors were not at liberty to retain, as against the remainder man, the arrears of the fee-farm rent, received by them, and to leave the arrears of the interest a charge upon the estate: particularly as *B.* in 1803 and 1821 became a party to family settlements, in which the estate was dealt with as if the fee-farm rent had been applied in payment of the interest; and benefits were given to him by those settlements.

Where an estate, subject to a charge bearing interest, is limited to several persons in succession, as tenants for life, the conclusion to be drawn from the authorities appears to be, that each tenant for life is liable only for the interest, for his own time; but that to liquidate the arrears during his own time, he must furnish all the rents, if necessary, during the whole of his life.

Testator directed that a certain debt of 25,000*l.* should be deemed part of the residue of his personal estate; and he gave it, and all interest due and to grow due thereon, and the residue of his personal estate, to trustees, upon trust to collect, and from time to time invest same; and to pay the interest of one-third part thereof to each of his three children for their lives; and after their decease, respectively, to pay one-third part of the principal to their children. After making his will, the testator by deed released to his debtor all interest which should become due on the 25,000*l.* during his life; and he agreed to postpone the payment of the principal sum and the interest to accrue due thereon, until the end of three years next after his decease; and then to accept payment of the principal sum and the interest which should have accrued due thereon during the three years, by instalments; and that the 25,000*l.* should not bear interest after the expiration of the three years, so long as the instalments were regularly paid; but that if default should be made in payment of the instalments, the balance should be payable with interest, until the instalments, with the interest, should be paid. By a codicil, the testator declared that the execution of this deed should not revoke, prejudice, or affect, his will. *Held*:—that the three years' interest did not form part of the capital of the residuary personal estate; and that the legatees for life of the residue were entitled to it.

A. as principal and *B.* as surety joined in granting an annuity for the life of *C.*; and *A.* assigned to trustees a policy of insurance upon his own life, upon trust to permit *C.* after the death of *A.*, out of the money insured or the interest thereof, to receive the annuity. And *A.* and *B.* executed their joint and several bond conditioned to secure the punctual payment of the annuity. The executors of *A.* received the amount of the policy and invested it upon Government securities. The executor of *B.* was compelled to pay *C.* an arrear of the annuity. *Held*:—that as against the general assets of *A.*, the executor of *B.* was not entitled to interest on the money so paid by him: but that he was entitled, as against the sum insured and the interest thereon, to be put in the same situation as if it had been duly applied in payment of the annuity, and therefore to be repaid thereout the money advanced by him, with interest.

C. having power to appoint a money fund to all and every or any child or children of hers, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment, to be equally divided between them, by her will, appointed different sums to several of her children: and reciting that her

1845. patrick, by indenture of the 7th of March, 1764, demised
 CAULFIELD the same to *Samuel Gerrard* and his heirs, subject to the
 F. yearly rent of 100*l.*, payable half-yearly, on every 1st of
 MAGUIRE. May and 1st of November.
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 Statement.

In February, 1766, *William* Baron *Annesley* borrowed a sum of 2000*l.* from *Elizabeth Salkeld*; to secure which he executed to her two bonds, each in the penal sum of 2000*l.*, conditioned for payment of the sum of 1000*l.*, with interest at six per cent. Upon these bonds judgments were obtained in Hilary Term, 1766.

By indenture of the 10th of March, 1766, it was agreed between *Elizabeth Salkeld* and *William* Baron *Annesley*, that if *Samuel Gerrard*, or the occupier of the lands demised by the lease of 1764, should pay the interest of the 2000*l.*, at the rate of 5*l.* per cent. per annum, he should have credit for same out of his rent; and that *Elizabeth Salkeld* should accept of that reduced rate of interest.

In pursuance of this arrangement, *Samuel Gerrard* for many years paid his rent to *Elizabeth Salkeld*, in discharge of the interest on the 2000*l.*

daughter *M.* had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she declared that she deemed her patrimony in that case sufficient for her maintenance; but in case *M.* should change her mind and return to her family and friends, she bequeathed to trustees 1000*l.* in trust for *M.* to receive the interest of the same during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent or not leaving any issue, the 1000*l.* to be divided amongst her three daughters therein named: and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned. Held:—(1), that the power authorized an appointment to take effect upon the happening of a contingency; (2) that the interest which should accrue on the 1000*l.* while the contingency was undetermined, passed under the residuary bequest in the will.

Testatrix gave a sum of money to her children who should be living at the time of her decease; and in case she should die without leaving any such issue, over: and having a power to appoint to the children of *D.*, she gave 2000*l.*, part of the fund, to the separate use of *A.* (one of the children), and if she died without issue by her then present husband or any other she might thereafter take, the 2000*l.* to be divided amongst other objects of the power.

Held:—that *A.* was absolutely entitled to the 2000*l.*

William Baron *Annesley*, having been created Viscount *Glerawley*, made his will in May, 1770; and thereby devised all his real estates to his eldest son, *Francis Charles*, afterwards created Earl *Annesley*, for life; remainder to his first and other sons, in tail male; remainder to his second son, *Richard*, afterwards Earl *Annesley*, for his life; remainder to his first and other sons in tail male: and by his will he created a trust term in his real estates, for payment of his debts and legacies. He died shortly afterwards.

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In 1772, after the death of *William* Viscount *Glerawley*, a partition was made of the lands, of which he and *Francis Annesley* were seised in common in fee: and a moiety thereof, including Gibbstown, Troystown, and Donaghpatrik, was vested in trustees, to the uses and for the purposes in the will of *William* Viscount *Glerawley* mentioned; and subject, among other debts, to the two judgments obtained by *Elizabeth Salkeld*.

Francis Charles Earl *Annesley* died in 1802, without issue male; and was succeeded by *Richard* Earl *Annesley*; and by indenture of the 19th May, 1803, executed on the marriage of *William Richard* Viscount *Glerawley*, eldest son of *Richard* Earl *Annesley*, the lands so allotted were re-settled, subject, among other debts, to *Salkeld's* two judgments (which were stated to be for the principal sum of 2000*l.*), to the use of *Richard* Earl *Annesley* for life; with remainder to *William Richard* Viscount *Glerawley* for life; with remainder to his first and other sons in tail male.

In 1776 the judgments were revived by *Thomas Salkeld*,

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the personal representative of *Elizabeth Salkeld*. In 1803 *Samuel Gerrard* sold his interest in the lands above mentioned to *John Gerrard*; and the interest on the sum secured by the judgments not having been otherwise paid either by the tenant of the lands demised by the lease of 1764 or otherwise, *Joseph Salkeld*, the administrator *de bonis non* of *Elizabeth Salkeld*, in 1818, filed a bill against *Richard Earl Annesley*, *William Richard Viscount Glerawley*, and others, to enforce payment of the judgment debts; and thereby claimed interest on the principal sums secured by the judgments, from the year 1786, up to which time it was admitted by the bill that all interest had been paid: and on the 9th of May, 1823, he obtained a decree for payment of the sum of 4000*l.* (the penal sums mentioned in the bonds), together with interest thereon, from the 3rd of May, 1823, and also for the costs of the suit: or, in default, a sale of the lands affected by the judgments.

While this suit was pending, an arrangement was entered into between *Richard Earl Annesley* and *William Richard Viscount Glerawley*, which was carried into execution by an indenture of the 1st of November, 1821; whereby, after reciting, *inter alia*, the marriage settlement of the 19th of May, 1803; and that *William Richard Viscount Glerawley* had executed his two bonds, with warrants of attorney, dated the 1st of November, 1821, to *Earl Annesley*, one of which was conditioned for the payment of 21,490*l.*, on the 1st of November, 1822, with interest, at the rate of five per cent.; and the other was conditioned for the payment of 3000*l.*, with interest from the day of the decease of *Earl Annesley*, the said principal sum and interest to be paid at the end of one year after the decease of the *Earl*; and that *Viscount Glerawley* was also indebted to the *Earl*

in 550*l.*, secured by his bond and warrant, said three sums amounting in the whole to 25,040*l.*, and that judgments had been entered upon those several bonds. And after further reciting that Viscount *Glerawley* was entitled to several policies of insurance upon his own life, and therein specified, for sums amounting to 24,492*l.* 6*s.* 8*d.* late currency, and that Earl *Annesley*, being advanced in years, had agreed to relinquish and give up to Viscount *Glerawley* the immediate possession and enjoyment of the settled estates; it was witnessed that in consideration (*inter alia*) of the several sums of money secured to be paid by the Viscount *Glerawley* as aforesaid, *Richard* Earl *Annesley* and *William Richard* Viscount *Glerawley* conveyed the Manor of Castlewellan, and several denominations of lands, being the settled estate (but not making mention of Gibbstown, Troystown, or Donaghpatrick), for their lives, and the life of the survivor, to the use of Lord *Dufferin* and the Rev. *A. Maguire*, for a term of 200 years; and, subject thereto, to the use, that *Richard* Earl *Annesley* should, during the joint lives of himself and his son, receive thereout an annuity of 4000*l.* for his life; and subject thereto, and to the term of years, to the use of Viscount *Glerawley*, for his life; and after his decease, to the use of *Richard* Earl *Annesley*, for his life: and the trusts of the term were declared to be, first, to secure the payment of the annuity of 4000*l.*; and further, that the trustees should, yearly, during the lives of the Earl and Viscount, and the survivor of them, out of the rents, or by mortgage or sale, levy and raise such yearly sums of money as should be sufficient to pay the several annuities and annual outgoings, and the interest payable upon the charges and incumbrances specified in the schedule to the deed annexed; amongst which, the debts due to the representatives of *Elizabeth Salkeld* were not included: and

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his heirs, executors and administrators, against all such sums of money as should become due from the 1st of May, 1821, upon foot of the same: and *Richard Earl Annesley* granted and assigned to Viscount *Glerawley*, for his own use, all rents and arrears of rent, of the said manor, lands, tenements and hereditaments, which were due and owing thereout to him, on the 25th day of March, 1821; and also the household furniture, stock, &c., in the house or demesne of Castlewellan. By this deed Earl *Annesley* and Viscount *Glerawley* appointed certain persons to be receivers of the rents of the estates; and they were authorized and directed to apply the rents according to the trusts of the deed: and it was provided, that the provision thereby made for Viscount *Glerawley* should be in lieu and satisfaction of an annuity of 2000*l.* provided for him by the settlement of 1803, and of certain other annuities therein mentioned: and further, that nothing in the deed contained should prejudice or affect the right of *Richard Earl Annesley*, as to any debt, charge or incumbrance, affecting the premises, then or theretofore vested in *Richard Earl Annesley*, his trustees, or assigns.

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After the decree had been pronounced in *Salkeld's* suit, *Richard Earl Annesley* entered into an arrangement with *Joseph Salkeld* for the purchase of his rights under that decree; and by two indentures of assignment, of the 3rd of March, 1824, *Joseph Salkeld*, in consideration of 4200*l.* paid to him by *Richard Earl Annesley*, assigned to a trustee for him the said two judgments; and by another indenture of equal date, *Joseph Salkeld*, in consideration of the sum of 1500*l.*, paid to him by Earl *Annesley*, assigned the benefit of the decree of May, 1823, to the same trustee, in trust for Earl *Annesley*.

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Richard Earl Annesley died on the 9th of November, 1824. By his will, dated the 24th of December, 1822, after reciting that he was entitled to a certain charge of 4200*l.*, affecting the settled estates, and to certain bond and judgment debts, due to him by his son-in-law, *George Henry M'Dowell Johnston*, he bequeathed the same to trustees, upon trust to raise and levy the amount thereof, in such manner, and at such times as his daughter, *Lady Anna Maria Johnston* should direct; and to pay and apply the same, and the interest thereof to and for her sole and separate use, free from the control of her husband: and he empowered his daughter, notwithstanding her coverture, to dispose of said sums of money, by deed or will (to be executed as therein mentioned), in such manner, and at such times, and to such persons as she should think fit; and in default of appointment, in trust for his said daughter, her executors, &c. And after further reciting that his son, *William Richard Viscount Glerawley* had executed to him his bonds, conditioned for the payment of the sum of 25,040*l.*; and that he himself had effected a policy of assurance upon his own life, for the sum of 5000*l.*, he directed that said two sums should constitute and be deemed part of the residue of his personal estate and effects; and he gave and bequeathed the same respectively, and all interest due and to grow due thereon, and all the rest, residue and remainder of his personal estate and effects, which, at the time of his decease, he should be possessed of or entitled to, and not thereby specifically disposed of, to his executors after named, upon trust, to raise and collect the same, and from time to time to invest the same in the purchase of Government securities; and to pay thereout his debts and legacies; and, subject thereto, upon trust to pay and apply the interest or annual proceeds of one-third of such residue

to the use of his son, *Charles Francis Annesley*, for his life; and from and after his decease, to pay and apply one-third part of the principal of said residue to the use of his children, as therein directed: and as to one other third part of such residue, upon trust to pay and apply the interest, or annual proceeds thereof, to and for the sole and separate use of his daughter, *Lady Catherine O'Donel*, free from the debts and engagements of her husband, and upon her receipt, during her life; and from and after her decease, upon trust to pay and apply one-third part of the principal of said residue, to and for the use of all and every, or any child or children of *Lady Catherine O'Donel*, other than an eldest son, and to the exclusion of any one or more of them, in such shares, and at such times, as his said daughter, notwithstanding her coverture, should, by deed or will (to be executed in the manner therein mentioned) direct and appoint; and in default of such appointment, or as to so much thereof as should be unappointed, to be equally divided between them, share and share alike, other than an eldest son: and as to the remaining third part of the said residue, upon trust to pay and apply the interest or annual proceeds thereof, to and for the sole and separate use of his daughter, *Lady Anna Maria Johnston*, for her life, free from the debts and engagements of her husband, and upon her receipt; and from and after her decease, upon trust to apply the remaining third part of the principal of such residue, to and amongst her children, in such shares, and at such times, as she should, by deed or will, appoint; and for want of such appointment, or as to so much thereof as should be unappointed, to be equally divided between them: and in case his said daughter, *Lady Anna Maria*, should die without leaving any child or children, then upon trust to pay and apply the said remaining third part of such

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residue to and amongst all and every, or any one or more child or children, to the exclusion of any other or others of them, of Lady *Catherine O'Donel*, in such shares, and at such times, as Lady *Anna Maria* should, by deed or will (to be executed as therein mentioned, and which, notwithstanding her coverture, she was thereby empowered to execute), direct or appoint; and in default of such appointment, or as to so much thereof as should be unappointed, to be equally divided between such child or children, other than an eldest son, share and share alike: and the testator appointed Lady *Anna Maria Johnston* and the Rev. *Arthur Maguire*, his executors; who, after his decease, proved his will.

By an indenture of the 13th of May, 1823, it was declared and agreed upon by and between Earl *Annesley*, Viscount *Glerawley*, and the trustees of the term of 200 years, created by the indenture of 1821, that the securities given by Viscount *Glerawley* to the Earl, for the sum of 25,040*l.* should not be payable with, or bear any interest during the life of *Richard Earl Annesley*: and Earl *Annesley* released and relinquished to Viscount *Glerawley* all interest due, or which should become due on foot of the securities for the 25,040*l.* during his life; such interest not to be raised or paid for the benefit of any person, but to merge in the premises: and *Richard Earl Annesley*, in consideration of Viscount *Glerawley* paying a certain debt of 6000*l.* and interest, by instalments of 2000*l.* per annum, the same being the proper debt of Earl *Annesley*, agreed to postpone the time of payment of the aforesaid sum of 25,040*l.*, and the interest to accrue due thereon, until the end of three years next after his decease; and it was further agreed, that the Earl,

his executors, &c., should then accept payment of the said sum, and the interest which should have accrued thereon, during the aforesaid period of three years, by half yearly instalments of 1000*l.*, until the entire 25,040*l.* and interest should be paid off and discharged: and Viscount *Glerawley* covenanted that he would, from and after the expiration of three years next ensuing the decease of the Earl, pay to the executors, &c., of the Earl, the yearly sum of 2000*l.*, by half yearly payments, until, by the application thereof, the principal sum of 25,040*l.*, and the interest thereof, which should have accrued during the said period of three years, should be paid and discharged: and it was further agreed, that the 25,040*l.* should not be payable with, or bear interest after the expiration of the three years, provided and so long as the instalments of 1000*l.* should be regularly paid; but if delay or default should be made in payment of the instalments, then, so often as same should happen, the 25,040*l.*, or any balance due thereon, should be payable with interest, from the expiration of two months from the time when such instalment should become due, until the same, with such interest, should be paid.

Richard Earl Annesley executed three codicils to his will; by the second of which, dated the 1st of August, 1823, after reciting that, since the execution of his will and first codicil, a certain indenture of the 13th of May, 1823, had been executed by him, he declared that the execution of said deed should not revoke, prejudice or affect his said will or codicil: and by the third codicil to his will, dated the 24th of April, 1824, the testator, after reciting that *Joseph Salkeld* had then lately obtained a decree for payment of certain judgment debts affecting the Castle-

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wellan estates, and that he had paid off his demands, and taken an assignment of the judgments and decree, he directed that the money paid by him on foot of said decree and securities should be deemed to be part of the residue of his estate, and be paid and applied as by his will directed. And he directed, that in case his daughter, *Lady Anna Maria*, should not make any appointment of the 4200*l.* mentioned in his will, the same should, after her decease, be paid to the children of *Lady Catherine O' Donel*, who should be then living, equally, share and share alike, except an eldest son.

The bill was filed by one of the children of *Lady Catherine O' Donel*, who was entitled to a portion of the residuary estate of the testator, against the several persons interested therein: and by a decretal order of the 16th of June, 1836, it was referred to the Master to take an account of the personal estate of *Richard Earl Annesley*, into whose hands the same came, and how applied and disposed of; and whether any, and what portion thereof remained still outstanding, or had been lost through the neglect or default of the executors of the testator; and to take an account of the debts, legacies, funeral and testamentary expenses of the testator; and further, that he do ascertain and report the clear surplus or residue of the testator's personal estate, and the rights of the plaintiffs and the other residuary legatees of the testator, in respect thereof; and whether the same had been applied or disposed of according to such rights or not.

On the 21st of November, 1844, the Master made his report, and found that, in addition to a sum of 14,494*l.* received by them, the executors of *Richard Earl Annesley*

were properly chargeable with the sum of 1452*l.* portion of the sum of 5700*l.*, charged by the decree of the Court, made in *Salkeld's* cause, on the estates of which Viscount *Glerawley* was then seised, and which had been paid off by *Richard Earl Annesley* : and also with a further sum of 161*l.* 19*s.* 4*d.* for interest on the sum of 4000*l.*, principal money, portion of the said sum of 5700*l.*, which accrued from the 3rd of March, 1824, when the demand was so paid by *Richard Earl Annesley*, to the day of his death. He also reported, that the executors had misapplied the sum of 683*l.*, principal money, part of the sum of 14,494*l.*, by payment thereof to Lady *Catherine O'Donel*, the Hon. *Francis Charles Annesley*, and Lady *Anna Maria Johnston*, in equal shares; because that, according to the true construction of the will, the executors should have invested that sum in the purchase of Government securities, and paid the interest thereof, only, to the said residuary legatees.

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The Master further reported, that the residuary personal estate of *Richard Earl Annesley* consisted, in part, of the sum of 5700*l.* due on foot of *Salkeld's* securities, and of the sum of 25,040*l.* due by *William Richard Viscount Glerawley*, afterwards *Earl Annesley*, with interest thereon, at the rate of five per cent., for three years next after the decease of the testator; said principal and interest amounting together to the sum of 28,796*l.*; and that, according to the true construction of the will, the executors ought to have invested, from time to time, the half-yearly instalments of 1000*l.*, which were paid to them by *William Richard Earl Annesley*, in discharge of said sum of 28,796*l.* But that, instead of so doing, and although the executors had received 4000*l.*, late currency, for instalments, up to

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the 1st of November, 1829, paid to them by *William Richard Earl Annesley*, they paid 346*l.* 1*s.* 5*d.*, present currency, part thereof, to the *Hon. Francis Charles Annesley*, Lady *Catherine O'Donel*, and Lady *Anna Maria Johnston*, equally, although they were only entitled to receive the interest of said sum; and he therefore reported, that said sum of 346*l.* 1*s.* 5*d.*, was not paid by the executors according to the rights of the parties.

From the report and schedules, it appeared that the Master reported that the 5700*l.* paid by *Richard Earl Annesley*, for the assignment of *Salkeld's* judgments and decree, and which was a charge upon the settled estates, together with the sum of 161*l.* 9*s.* 4*d.*, interest on the sum of 4000*l.*, part of the said sum of 5700*l.*, from the 3rd of March, 1824, to the death of the testator, and also the sum of 2150*l.*, being the arrears of the fee-farm rent of 100*l.* per annum, due the testator out of the lands of *Gibbetown*, *Troystown* and *Donaghpatrick*, and which was received by his executors from *John Gerrard*, on the 9th of July, 1825, formed part of his residuary personal estate. And he charged the executors with the said sum of 2150*l.*, received by them; and with the sum of 1452*l.*, being the balance of the sum of 1700*l.* taxed costs and interest, charged on the family estates by the decree in *Salkeld's* cause, after giving credit for 248*l.*, paid on account of said costs and interest, by *William Richard Earl Annesley*, and which 1452*l.* was lost by the default of the executors; and also with the aforesaid sum of 161*l.* 19*s.* 4*d.*, lost by their default.

The cause having come on to be heard upon report, exceptions and merits, the first question arose upon excep-

tions taken by the personal representatives of the executors of *Richard Earl Annesley*, to that part of the report and schedules which charged the executors with the sums of 5700*l.* and 161*l.* 19*s.* 4*d.* on foot of *Salkeld's* judgments, and 2150*l.* for arrears of the fee-farm rent of Gibbstown, Troystrown, and Donaghpatrick; and they thereby insisted, (1), that the arrears of the fee-farm rent ought to have been applied by the Master in payment of the interest which accrued due on *Salkeld's* securities during the life of *Richard Earl Annesley*, and which interest formed part of the sum of 5700*l.* and 161*l.* 19*s.* 4*d.*: (2), that the executors ought not to be charged with any interest on the principal sum of 2000*l.*, secured by *Salkeld's* judgments, as *Richard Earl Annesley*, being tenant for life of the lands, was bound to keep down the interest on the charges affecting the estates; and that the executors ought only to be charged with the principal sums of 2000*l.* and 1500*l.* for costs: (3), that the Master ought not to have charged the executors with the said sum of 2150*l.*, but should have found upon the evidence, that same was properly applied in discharge of interest which accrued due on *Salkeld's* securities during the life of *Richard Earl Annesley*.

It was stated, that in 1826, the executors settled an account with *William Richard Earl Annesley*; and, having charged him with the sum due on foot of the money paid for the assignment of *Salkeld's* securities, they gave him credit for the 2150*l.* received by them from Mr. *Gerrard*.

Mr. *Moore*, Mr. *Brooke*, Mr. *J. S. Furlong*, and Mr. *Maguire*, for the exceptants.

The executors ought not to have been charged both with the interest on the principal sum of 2000*l.*, and with the

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arrears of *Gerrard's* rent, which was the fund to pay it; for, having received the fund which was appropriated to the payment of the interest, they were not entitled to charge the estate a second time with the amount of that interest. Also, *Richard Earl Annesley*, being tenant for life of the estates, was bound to keep down the interest on the charges affecting the inheritance. It may be said, that the obligation of a tenant for life to keep down interest only extends to such interest as accrues during his tenancy; and that here, part of the interest in question accrued during the time of *Francis Charles Earl Annesley*, the first tenant for life under the will of *William Viscount Glerawley*. But *Lord Penrhyn v. Hughes(a)*, and *Tracy v. Lady Hereford(b)*, show that the second tenant for life is bound to discharge the interest which accrued due during the tenancy of the first tenant for life, as well as that which accrued in his own time; and that the successive tenants for life must settle their equities amongst themselves. Here, also, *Richard Earl Annesley* was tenant for life, in possession of the estates for more than twenty years after the death of his elder brother, the first tenant for life; it may, therefore, be assumed that all the interest which was decreed to be paid to *Joseph Salkeld*, by the decree of 1823, actually accrued during the tenancy of *Richard Earl Annesley*. The dealings between the parties in 1803 and 1821 render it impossible for *Richard Earl Annesley*, or his executors, ever to raise this interest out of the inheritance; for, in 1803, the father and son resettled the estates upon the assumption that the sum due on *Salkeld's* judgments was 2000*l.* only; and in the arrangement of 1821 both the judgments and the lands held by Mr. *Gerrard* were omitted. These circumstances show, that all parties agreed that, as between

(a) 5 Ves. 99.

(b) 2 B. C. C. 128.

themselves, the fee-farm rent should be the fund for payment of the interest.

The *Solicitor-General* (Mr. *Greene*), and Mr. *Monahan*, in support of the report.

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The executors are properly charged with the arrears of rent, 2150*l.*; it clearly formed part of the assets of the testator; it was an arrear which wholly became due in his lifetime. They are also properly charged with that portion of the 5700*l.*, which consisted of interest on the 2000*l.*, secured by *Salkeld's* judgments. That sum bore interest at six per cent.: and the entire amount of interest paid off by Earl *Richard* accrued due between 1786 and the death of *Francis Charles* Earl *Annesley*, in 1802. It was an arrear which became due during the tenancy of the prior tenant for life; and which the persons entitled to the inheritance had no right or equity to cast upon the succeeding tenant for life. *Lord Penrhyn v. Hughes* was not the case of successive tenancies for life; it merely decided that a tenant for life was bound to keep down the interest which accrued during his own time; and that a mortgagee, purchasing from him, was not in a better situation. *Tracy v. Lady Hereford* was the case of an arrear of interest becoming due, during the time of a tenant for life of an estate, which was partly in possession and partly in remainder after a prior estate for life, the prior estate for life not being subject to the charge. The rents of that part of the estate which was in possession were not sufficient to keep down the interest; but the estate in remainder having fallen in, it was held, that the tenant for life was bound, out of its rents, to pay off an arrear of interest which had previously accrued due in his own time. The interest which becomes due during the time of each successive tenant for life is

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Mr. Brooke in reply. *Lord Penrhyn v. Hughes* is an authority in point; for, in that case there were prior estates for life, during the existence of which part of the arrear probably accrued. And it is just and equitable that, as between a tenant for life and the remainder-man, the tenant for life should be bound to pay off an arrear of interest which accrued due during the time of a prior tenant for life; for it is the duty of each succeeding tenant for life to see that the next preceeding tenant for life does not permit an arrear of interest to accrue.

Upon this point the Lord Chancellor reserved his judgment.

Judgment. THE LORD CHANCELLOR:—

This case was said to depend upon the mere question of law, viz., whether a second tenant for life of an estate charged with an incumbrance carrying interest, is not bound to discharge not only the interest which accrues in his own time, but also any arrears left unpaid by the previous tenant for life. For the affirmative of this position, the case of *Tracy v. Lady Hereford* was relied on.

In *Revel v. Watkinson(a)*, the estate was devised to one for life, with remainders over, subject to a trust to raise his debts, in effect, by mortgage or sale. The estate was not

(a) 1 Ves. 93.

sold or mortgaged ; and, during the continuance of a jointure under a prior settlement, the rents were insufficient to keep down the accruing payments and the interest of the debts. Lord *Hardwick* held that the whole life interest was liable to keep down the interest, (although, in effect, during the jointure, part of it was in reversion), so that when the jointure fell in, the tenant for life was bound to apply all the rents to the liquidation of the arrears of interest. But this only affected the time of the tenant for life. But Lord *Hardwicke* said, that if there is a tenant for life, the remainder for life, and during the first estate for life, the whole profits are not sufficient to answer the interest of the debts, so that there is an arrear, he agreed that it should be a charge on the inheritance, when it is by the same settlement ; a tenant for life being then only obliged to keep down the interest incurred during his own life.

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Tracy v. Lady Hereford was not, as it was insisted before me, the case of two successive tenants for life, in which the second was compelled to pay interest left unpaid by the prior tenant for life ; but it was the case of a tenant for life of an interest under a will, subject to mortgages and charges, where part of the estate was in possession and part remained in the possession of a jointress for twelve years after the testator's death, under the limitations in a prior settlement. There was no attempt to charge the tenant for life beyond her own time : but during the life of the jointress, who was not bound to pay any part of the interest on the charges, the rents of the estate in possession were insufficient to pay the interest ; and the tenant for life insisted that she was not liable to make good the arrear during her own time out of the additional rents when the jointress died : and it was decided that she was liable

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But this does not seem to me to touch the question between successive tenants for life and the remainderman.

Lord Penrhyn v. Hughes(a) only decided that a mortgagee, buying the life estate, cannot charge any interest against the inheritance, which his vendor was bound to pay out of the rents, but which the mortgagee had permitted to remain unpaid before his purchase. I think this decision was quite right. But Lord *Alvanley* seems to have considered it as established by *Tracy v. Lady Hereford*, that the rents, during the estate for life, must be applied to the reduction of any interest accrued prior, as well as subsequent, to the commencement of that estate. It does not appear to me that the case established so wide a rule; nor was it necessary to lay down such a rule in order to decide the case of *Lord Penrhyn v. Hughes*. I am not prepared to fix the defaults of every previous tenant for life on the last taker for life. It is as incumbent on the reversioner in fee to look after the tenant for life in possession, as it is on a tenant for life in remainder. This may lead to some inconvenience, as to the manner in which an arrear shall be thrown upon the inheritance; but it is a duty from the labour of which a Court of Equity ought not to shrink. Upon the authorities now before me, I should be inclined to come to the conclusion, that every tenant for life is liable only for his own time; but that, to liquidate the arrear during his own time, he must furnish all the rents, if necessary, during the whole of his life. *Bulwer v. Astley*(b), is a remarkable instance of the anxiety of a Court of Equity to cast a burden rateably on the tenant for life and the reversioner.

(a) 5 Ves. 99.

(b) 1 Phil. 122.

The case, however, before me is a peculiar one. The lands of Gibbstown, producing 100*l.* a year, were, in the view of this Court, made the particular fund for payment of the interest; and were so applied until 1786. It does not appear that the first tenant for life ever received any part of the rents; but in 1825 twenty-one and a half years' arrears were paid to *Richard Lord Annesley*, the second tenant for life. Now the interest had reached the amount of the judgments in 1803, and *Richard* had only become tenant for life in possession in 1802, and from that period he was, of course, liable to the interest while it ran on. But it does not appear to me that he was at liberty to retain the arrears, although accruing wholly in his own time; for they were applicable specifically to the interest: and even if, in an ordinary case, he could have retained them for his own use, yet, after making the settlement of 1803, in which the judgments are put down in the schedule at 2000*l.*, and the settlement of 1821, he was not, I think, entitled to claim the arrears of the rent of 100*l.* for his own use, leaving the arrears of interest a charge on the estate. That would be contrary to the true meaning of the settlement, by which all the benefits of the estate were to go to the eldest son, subject to the specific provisions for *Earl Richard*; and the arrears of rent, to which he was to be entitled, were regularly secured to him by the settlement.

The exceptions were overruled; but it was declared, on further directions, that the exceptants were entitled to credit for the sum of 2150*l.* late currency.

The next objection, which also arose upon an exception taken by the personal representatives of the surviving executor of *Richard Earl Annesley*, had relation to the sum of

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Testator directed that a certain debt of 25,000*l.* should

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be deemed part of the residue of his personal estate; and he gave it, and all interest due and to grow due thereon, and the residue of his personal estate, to trustees, upon trust to collect, and from time to time invest same; and to pay the interest of one-third part thereof to each of his three children for their lives; and after their decease respectively, to pay one-third part of the principal to their children. After making his will, the testator by deed, released to his debtor all interest which should become due on the 25,000*l.* during his life; and he agreed to postpone the payment of the principal sum, and the interest to accrue due thereon, until the end of three years next after his decease; and then to accept payment of the

3467*l.* 1*s.* 5*d.*, which the Master, by his report, found was not paid or applied by the executors according to the rights of the residuary legatees; the executors insisting that the Master should have found that said sum was duly paid pursuant to the trusts of the testator's will, it being the amount of the interest which had accrued due on the principal sum of 25,040*l.* after the testator's death.

Mr. Moore, Mr. Brooke, Mr. J. S. Furlong, and Mr. Maguire, for the exceptants.

The Solicitor-General and Mr. Monahan contra.

According to the true construction of the will, the intention of the testator was, that the three years' interest on the 25,040*l.* should constitute part of the principal of the residue; and the interest only on it was properly payable to the tenants for life of the residue.

Mr. Brooke in reply.

THE LORD CHANCELLOR:—

At the time when the will was made, the 25,040*l.* carried interest; and it was distinctly given as part of the residue, in equal shares, to three persons for their lives, and then to their children as they should appoint. If the matter had rested there, no question could have arisen: but the testator subsequently made a new arrangement with his son, whereby he released him from the payment of interest upon the principal sum during his, the testator's, life, and postponed the payment of the principal sum and interest for three years after his death, at which period the interest was to cease; and the three years' interest being added to

the principal sum, the whole was to be paid by half-yearly instalments of 1000*l.* each. The testator then added a codicil to his will; and thereby reciting the deed by which the foregoing arrangement had been made, he declared it to be his will, that the execution of that deed should not revoke, prejudice, or affect his will in any respect. Now, if that deed is not to revoke, prejudice, or affect the will, the interests of the tenants for life of the residue must remain as they were under the will, except so far as they are affected by the payment of the interest being postponed for three years. But that interest was not relinquished, though the payment of it was postponed. How, then, can I execute the intention, if I do that which the Master has done, viz., take from the tenants for life that which was bequeathed as interest, and make it principal money? As the three years' arrears of interest were to be paid off, together with the principal money, by instalments, it was natural to form them into one aggregate sum: but if the principal sum had borne interest (as it was originally intended it should), the tenants for life would have been entitled to this money; and the codicil declares that the deed was not to revoke, prejudice, or affect their rights. The interest is to remain in arrear for a certain period; but that is not a reason why the residuary legatees should be deprived of it. It is still interest. If the instalments are not paid regularly, then the principal sum is to bear interest. To whom would that interest belong? It would not form part of the capital, but belong to the tenants for life. I cannot form a reasonable doubt upon this case. I am not at liberty to read this will so as to make it applicable to the subsequent change of circumstances; but I am at liberty to read it and the deed as connected together by the codicil; and to say that, so far as interest is payable, it

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principal sum, and the interest which should have accrued due thereon during the three years, by instalments; and that the 25,000*l.* should not bear interest after the expiration of the three years, so long as the instalments were regularly paid; but that if default should be made in payment of the instalments, the balance should be payable, with interest, until the instalments, with the interest, should be paid. By a codicil, the testator declared that the execution of this deed should not revoke, prejudice, or affect his will. *Held*: that the three years' interest did not form part of the capital of the residuary personal estate; and that the legatees for life of the residue were entitled to it.

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is to go to the tenant for life. It would be a mere trap to catch executors, dealing fairly in the execution of their trust, if I were to hold otherwise. The persons entitled to the residuary estate are most unjustly endeavouring to fix the executors with the payment of this sum.

Allow the exception; and declare that the tenants for life are entitled, according to the true construction of the will, to the three years' interest, and that the sum mentioned in the exception was properly paid to them by the executors, and ought to be allowed to the executors in their account.

Statement.

A. as principal and *B.* as surety joined in granting an annuity for the life of *C.*; and *A.* assigned to trustees a policy of insurance upon his own life, upon trust, to permit *C.*, after the death of *A.*, out of the money insured or the interest thereof, to receive the annuity. And *A.* and *B.* executed their joint and several bond conditioned to secure the punctual payment of the annuity. The executors of *A.* received the amount of the policy and invested it upon Government securities. The executor of *B.* was compelled

The next question arose under these circumstances, which were stated in the report:

Sophia, formerly styled Countess *Annesley*, claimed to derive certain charges on the real and personal estate of *Francis Charles Earl Annesley*, under a deed of the 2nd July, 1798. To enforce those claims she, in 1817, filed her bill against *Richard Earl Annesley* and others; and having obtained a decree to account therein, *Richard Earl Annesley* entered into a consent with her, in that cause, dated the 24th of January, 1820, whereby the Earl agreed to secure her an annuity of 455*l.* for her life; and she agreed to give up to the Earl all money due to her on foot of the deed of the 2nd of July, 1798. And, the better to carry that consent into effect, *Richard Earl Annesley* applied to his son *William Richard Viscount Glerawley*, to join him in securing the said annuity; which he agreed to do: and, accordingly, by indenture of the 27th of April, 1820, *Richard Earl Annesley*, and *William Richard Viscount Glerawley*, granted to trustees, their executors, &c., an annuity of 455*l.*, late currency, equivalent to the sum of

420*l.* present currency, for the natural life of *Sophia* Countess *Annesley*, payable quarterly; and also granted to the same trustees, their executors, &c., the townland of Castlewellan, and other lands, for the term of ninety-nine years, provided the Earl and Viscount, or either of them, should so long live; and *Richard* Earl *Annesley* also assigned to the same trustees a policy of assurance, upon his own life, for 5000*l.*, and several charges affecting the Castlewellan estates, therein mentioned: and it was declared that the lands and securities were assigned to the trustees upon trust to permit *Sophia* Countess *Annesley*, during her life, out of the rents of the lands, and after the decease of Earl *Richard*, out of the said charges and the said sum of 5000*l.*, insured on the life of Earl *Richard*, or the interest or proceeds thereof, to receive and take the said annuity. And, by bond of equal date therewith, *Richard* Earl *Annesley* and Viscount *Glerawley* jointly and severally became bound to the same trustees in the sum of 3000*l.*; the condition of which was, that if default should be made in payment of the annuity, for twenty-one days after the same should become payable, then and so often as the same should happen during the joint lives of the Earl and *Sophia* Countess *Annesley*, it should be lawful for the trustees to issue execution on any judgment to be obtained on the bond, against the Earl, his executors or administrators; and to levy off his goods and chattels, for the use of said *Sophia*, all arrears of said annuity: and that if *Sophia* should survive the Earl, that it should be lawful for her(*a*) to issue execution upon any judgment which should be obtained against the Viscount *Glerawley*, his executors or administrators; and, by virtue thereof, to levy off his goods and chattels the said annuity, and all arrears thereof.

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to pay *C.* an arrear of the annuity. *Held* that, as against the general assets of *A.*, the executor of *B.* was not entitled to interest on the money so paid by him: but that he was entitled, as against the sum insured and the interest thereon, to be put in the same situation as if it had been duly applied in payment of the annuity, and therefore to be repaid thereout the money advanced by him, with interest.

(*a*) *Sic.* in brief.

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At the time when these securities were executed, *Richard Earl Annesley* was tenant for life of the settled estates, with remainder to *William Richard Viscount Glerawley* for his life, with remainder to his first and other sons in tail; and Viscount *Glerawley* joined his father in executing them, merely as a surety, and without having received any consideration for the same.

This annuity of 455*l.* was one of the annuities mentioned in the schedule to the deed of the 1st of November, 1821, before mentioned, and which, during the joint lives of Earl *Annesley* and Viscount *Glerawley*, and the survivor of them, was to be paid and kept down out of the rents of the estates.

William Richard Earl Annesley died in August, 1838, having appointed *J. R. Moore* his executor; and after his decease *Sophia Countess Annesley* compelled *J. R. Moore* to pay her twenty-three quarterly gales of the annuity, amounting to the sum of 2415*l.* present currency, the whole of which had accrued due after the decease of *William Richard Earl Annesley*. And the Master reported that *J. R. Moore* was entitled to claim and receive that sum from the assets of *Richard Earl Annesley*; and that the personal estate of the testator was also liable to such further sums as *J. R. Moore*, as such executor, should be compelled to pay in keeping down and discharging said annuity.

To this Report *J. R. Moore* excepted, because the Master had not allowed him interest on the sum of 2415*l.* from the time he paid same.

Argument.

Mr. *W. Brooke* and Mr. *Shaw* for the exception.

Although a surety in a bond, paying off the bond debt, becomes a simple contract creditor only of the principal, *Copis v. Middleton*(a), yet he is entitled to be repaid by the principal, the sum so paid by him, with interest; *Lawson v. Wright*(b), *Onge v. Truelock*(c). Also, although, generally speaking, interest is not recoverable upon the arrears of an annuity, yet it is given where there are special circumstances; *Martyn v. Blake*(d); *Hay v. Cox*(e); *Booth v. Leycester*(f). And as the surety, discharging the debt, is entitled to the benefit of all securities given for the debt, *Woods v. Creagh*(g), *Hill v. Kelly*(h); so here the executor of *William Richard Earl Annesley* is entitled to stand as an annuity creditor of *Richard Earl Annesley*, and to be paid the arrears of the annuity, with interest; for his executors, though in possession of funds to discharge the demand, have wilfully declined to do so. Upon another ground also, the executor of *William Richard* is entitled to interest, viz., that one of the securities given for the payment of the annuity was a policy of insurance on the life of *Earl Richard* for 5000*l.* That sum has been received by his executors, and has been invested in Government stock, where it has been fructifying. The dividends ought to be applied in payment of the interest on the 2415*l.* *Hyde v. Price*(i).

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The *Solicitor-General* and Mr. *Monahan* for the residuary legatees.

This case is not distinguishable from *Copis v. Middleton*.

(a) Tur. & R. 224.

(b) 1 Cox. 275.

(c) 2 Moll. 42.

(d) 3 Dru. & War. 125.

(e) 1 Ridg. P. C. 153.

(f) 1 Keen. 247. 3 M. & C. 459; S. C.

(g) 2 Hog. 50.

(h) Ir. T. R. 265.

(i) 8 Sim. 578.

1845. As to *Lawson v. Wright*, it does not appear to have been argued; and there may have been special circumstances in it not mentioned in the report. As reported, it is not law. The recent Statute 3 & 4 Vic. c. 105, allowing interest to be given upon simple contract debts in certain cases, is conclusive as to what is the law on the subject.

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Judgment. THE LORD CHANCELLOR:—

This appears to be an attempt to get rid of *Copis v. Middleton*. That case established that a surety in a bond, paying off the demand, does not become a specialty creditor of the principal, but only a creditor by simple contract. But it was said that that simple contract debt carried interest. I know of no authority for that. In an action for money paid, interest cannot be recovered unless there be some dealing between the parties to warrant it;—something to show that it was part of the contract. This is a mere simple contract demand, not carrying interest; and upon this point there can be no doubt.

The other point is of a different nature. By the deed securing the annuity, for which the bond of the principal and surety was given, a policy of insurance, payable upon the death of Earl *Richard*, was assigned to trustees, as a collateral security, upon trust, after the decease of the Earl, to raise the annuity out of the monies secured thereby. That fund became part of the assets of Earl *Richard*, and was accordingly administered in this suit as a part of his estate; and the persons who now resist the demand of the surety, have received out of Court, as part of the residuary estate of the

testator, that very sum of 5000*l.* which was pledged for the payment of the annuity, and also the interest which has accrued due on it since it was received by the executors. They, who now seek to throw this demand upon the surety, represent the principal debtor, and have got a portion of the very fund which, by the deed of 1820, was provided for the payment of the annuity itself. In this Court you cannot go against the surety whilst the fund primarily applicable remains; for he has a right to have that fund applied for his benefit: there is no doubt, therefore, that the surety would have a right to go against those parties for the whole amount of the 5000*l.*, and the interest on it, to be repaid thereout what he has lost. If that sum had been properly applied, he would not have lost anything; he never would have been called on to pay. Now, that 5000*l.* has produced interest; and I have no doubt that the surety is entitled to the benefit of that which it has produced. He is entitled to go against the interest, as far as it extends, to pay him what he has lost, and to go against the corpus of the fund for payment of the principal money. There is no doubt that the 5000*l.* ought first to have been applied in payment of the annuity; and, if necessary, the principal of the fund ought to have been sold for payment of the annuity. If that had been done, there would not have been a loss as to interest. This question ought, however, to come on upon further directions and merits; and then the relief would be to declare that the 5000*l.* was the first fund for payment of the annuity; and that the surety ought to be placed in the same situation as if that fund had been so applied. That can only be done by giving him interest, for the fund has been producing interest.

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I think that the equity of the surety is, that he ought,

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out of the interest which that sum would have produced, to be allowed interest on his several advances, from the times they were made to the present period; and that then, out of the principal and interest, he is to be paid the principal sums he has advanced; and the remainder of that fund will still be liable to keep down the accruing gales of the annuity. I consider the 5000*l.* as still bearing interest, though it has been paid over to the parties. I overrule the exception, and make this declaration upon further directions; and refer it to the Master to ascertain what sum ought to be impounded to meet the demand of the surety on the estate.

Statement.

C. having power to appoint a money fund to all and every, or any child or children of her's, and to the exclusion of any one or more of them, in such shares, and payable at such times, as she should appoint, and in default of appointment, to be equally divided between them; by her will, appointed different sums to several of her children: and reciting that her daughter M. had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she declared that she deemed her

Another question arose upon the execution of the power of appointment given by the testator to Lady Catherine O'Donel, over her one-third of the residuary personal estate.

By her will, dated the 26th of October, 1829, duly executed and attested as required by the power, Lady Catherine O'Donel disposed of her one-third of the sums of 25,040*l.* and 511*l.* 19*s.*, Government Stock, therein particularly mentioned, being part of the residuary personal estate of the testator, by giving certain sums thereof to her daughters. The disposition in favour of her daughter, Mary O'Donel, was in these terms: "And whereas my daughter, Mary O'Donel, having declared her intention of becoming a recluse or nun, and having already retired into a convent, preparatory thereto, I deem her patrimony in that case sufficient for her maintenance; but should she change her mind, and return to her family and friends, I leave and bequeath to my executors the sum of 1000*l.*, in trust for my said daughter Mary, to receive the interest and produce of the same during her life, and, at her decease, to be divided

to and amongst her children, if any ; or in either case of her not leaving the convent, or not leaving any issue, the said sum of 1000*l.*, to be divided among my daughters aforesaid, *Margaret, Catherine, and Isabella,*" share and share alike; and she bequeathed to her daughters, *Margaret, Catherine, and Isabella,* any residue or remainder of her one-third of the said sums of 25,040*l.* and 5111*l.* 19*s.*, that might be after paying the several legacies in her will mentioned, share and share alike. The testatrix did not make any disposition of the remainder of her one-third of the residuary personal estate of *Richard Earl Annesley*; and died in 1830, leaving *Mary O'Donel* and five other younger children her surviving. The Master reported that *Mary O'Donel* ever since continued, and still was, an occupant of the convent into which she had retired, as in the will of the testatrix mentioned; and that she had declared her intention not to return to her family and friends; and that, following up her intention, she had become a professed nun, or member of the religious community into which she had retired in the life-time of *Lady Catherine O'Donel*: and he reported that *Mary O'Donel* was entitled, for her life, to the interest or dividends to arise on the sum of 1000*l.*, so bequeathed by *Lady Catherine O'Donnell*, in trust for *Mary O'Donel*, in case she should change her mind and return to her family and friends, and abandon her intention of becoming a nun, and that she should leave the convent into which she had retired preparatory thereto, as in the will of *Lady Catherine O'Donel* in that behalf mentioned; and that, after the decease of *Mary O'Donel*, in the events aforesaid, the said sum of 1000*l.* should go to be divided amongst her children, if any.

The Master further reported that the principal sum of

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patrimony in that case, sufficient for her maintenance; but in case *M.* should change her mind, and return to her family and friends, she bequeathed to trustees 1000*l.* in trust for *M.* to receive the interest of the same during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent, or not leaving any issue, the 1000*l.* to be divided amongst her three daughters therein named: and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned. Held (1), that the power authorized an appointment to take effect upon the happening of a contingency; (2) that the interest which should accrue

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on the 1000*l.*,
while the con-
tingency was
undetermined,
passed under
the residuary
bequest in the
will.

1000*l.*, and the dividends and interest thereon, should be carried to the separate credit of *Mary O'Donel*, and should be impounded during her life-time; and that, after her decease, in the event of her not leaving the convent, certain persons mentioned in his report would be entitled to the principal sum of 1000*l.* and the said interest and dividends thereon.

To this report *Mary O'Donel* excepted, on the ground that the Master ought to have reported that she was entitled to be paid the dividends and interest on the 1000*l.* which should accrue during her life.

Argument.

Mr. *Deasy* and Mr. *Graydon*, for the exception.

The appointment to *Mary O'Donel* is good, but the condition annexed to it is void, and separable from the gift; and, therefore, she takes a life interest in the 1000*l.*, discharged of the condition. In *Hay v. Watkins*(a), your Lordship observes:—"The cases go to this extent: that where the intention to benefit the object of the power is clear, and that something is superadded, a condition not warranted by the power, there the gift is good; the Court will strike out what is excessive, and the appointee will take the fund absolutely." Here the fund was authorized to be paid "in such shares, and at such times" as the donor of the power should appoint; but these words do not authorize a conditional appointment. But if the condition be inseparable from the gift, then the whole gift is void: and the 1000*l.* does not pass under the gift of the residue, for where there is a gift of portion of an ascertained fund to one person, and of the residue of it, after payment of the first gift, to another, and the first gift fails, the object of

(a) 3 D. & War. 339.

the second gift does not take it, but it is undisposed of; *Easum v. Appleford*(a). In that view of the case, *Mary O'Donel* is entitled to a portion of the principal fund and interest, as being unappointed, and the report is incorrect. But if the condition be held to be operative, still *Mary O'Donel* is entitled to a portion of the interest which shall accrue during her life. For the gift over is, in the event of *Mary O'Donel* not leaving the convent, or leaving it and not leaving any issue; in either of which events, the principal sum of 1000*l.*, but not the interest which shall accrue thereon during the life of *Mary*, is given over. That interest, therefore, goes as in default of appointment. *Henderson v. Constable*(b).

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Argument.

The *Solicitor-General* and Mr. *Monahan*, contra.

In this case the donee had an exclusive power of appointment; she might give or not as she pleased; and consequently might annex a condition to her gift, excluding one of the objects of the power, unless certain terms were complied with. The gift, both of the interest and principal, is contingent upon *Mary O'Donel* leaving the convent. But if the appointment be invalid, the 1000*l.* passes under the residuary gift in the will.

Mr. *Graydon*, in reply, cited *Sadler v. Pratt*(c).

THE LORD CHANCELLOR:—

I do not see where the difficulty is. Lady *Catherine O'Donel* had an exclusive power to appoint this fund among her younger children, in such shares and payable at such times, as she thought fit; therefore she might exclude any of

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(a) 10 Sim. 254; 5 M. & C.
58.

(b) 5 Beav. 297.
(c) 5 Sim. 632.

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them, or provide for any of them as she pleased, within the limits allowed by law. She recites that her daughter, *Mary*, had declared her intention of becoming a nun, and had already retired into a convent preparatory thereto, and that her patrimony in that case would be sufficient for her maintenance; and then adds, that in case her daughter should change her mind, and return to her family, she gave to her executors 1000*l.* in trust for her daughter to receive the interest and produce of the same during her life; and, at her decease, to be divided amongst her children (which was an excess in the execution of the power, and could not take effect); and in either case of her not leaving the convent, or not leaving any issue, the 1000*l.* was to be divided among three of her daughters, whom she names, equally; and she then gives to the same three daughters any residue or remainder that may be after paying the several legacies before mentioned.

The question arises upon the validity of these gifts. The Master has found that the principal sum of 1000*l.*, and the interest or accumulations thereon, are to remain impounded until the death of *Mary O'Donel*, who is still living. On the other hand it is insisted (1), that this is an absolute gift to *Mary O'Donel* for her life; that the condition is void and separable; and, therefore, that the legatee is entitled to the legacy, discharged of the condition: (2), or if not separable, that the entire appointment fails, and that the 1000*l.* goes as in default of appointment, and does not pass under the gift of the residue: and (3), that, at all events, the interest of this sum, during her life, must go as in default of appointment. None of these points can, in my opinion, be maintained. This is not a gift with a condition annexed to it; but it is a gift which is to take effect

upon the happening of a contingency ; and is clearly good as such, and warranted by the power. It is a gift, in case she shall leave the convent and come among her friends, to her for her life, and afterwards to her children. The gift to the children is void ; and if the gift over had been made to depend upon the gift to the children, that gift also would have been void. But here the gift over depends upon the contingency of *Mary O'Donel* not leaving the convent, or dying without issue ; and, according to the authorities, such a gift to the objects of the power is good. Then, as to the interest upon the 1000*l.*, which shall accrue before the contingency happens,—there is no specific gift of that interest at all ; the principal only of the fund is disposed of ; and that upon a contingency which may never arise ; but the Court will impound so much of the assets as is necessary to answer the contingency, if and when it arises. But the residuary gift is general ; it is of whatever will remain after payment of the legacies before given out of the fund. It is said that this residuary gift would not carry the 1000*l.*, if the 1000*l.* had been badly appointed ; but it is not necessary to discuss that question, for here there is no gift of this interest ; and, therefore, the gift of the residue is a gift of the interest, which, from time to time shall accrue. It is nothing more than this : the testatrix gives to her three daughters the interest upon the 1000*l.*, until her daughter, *Mary*, leaves the convent, and comes again into the world ; and if she should leave the convent, then she gives the interest to her for her life, and the principal afterwards to her children (which is void) : and if she should not leave the convent, then she gives the principal to her three other daughters. The exception is wrong in point of form ; but, upon further directions, I shall declare this to be a valid gift, to take effect in case *Mary*

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O'Donel shall leave the convent and come again her friends; and direct that a sufficient sum be appropriated to answer this 1000*l.* when that event take place, or *Mary* shall die. And declare that much of the funds in Court as have arisen from dividends upon this 1000*l.* belong to the three legatees, and that they are now entitled to have the same divided between them; and declare that the residuary legatees are entitled, under the residuary gift, to the same dividends which shall accrue whilst *Mary* continues to reside in the convent; and, upon the death of *Mary*, reserve liberty for all parties to apply. I shall however, now declare that the gift to the children of *O'Donel* is void, though it clearly is, because the same may never arise.

Statement.

Testatrix gave a sum of money to her children who should be living at the time of her decease; and, in case she should die without leaving any such issue, over; and having a power to appoint to the children of *D.*, she gave 2000*l.*, part of the fund, to the separate use of *A.* (one of the children), and if she died without issue by her then present husband, or any other she might thereafter take, the 2000*l.* to be divided amongst other

The last question arose upon the construction of the will of Lady *Anna Maria Johnston*.

By her will, dated the 15th of February, 1834, and citing the powers given to her by the will of *Richard Annesley*, both with respect to the sum of 4200*l.*, and one-third of his residuary personal estate, she appointed 4200*l.* (over which she had an absolute power of disposal) to all and every or any child or children she might have and who should be living at the time of her decease, in case she should die without leaving any such issue, she gave the 4200*l.* to other persons. And as to her one-third of the residuary personal estate of *Richard Earl Annesley* she gave 2000*l.*, part thereof, to trustees in trust "to apply the said sum of 2000*l.* to the sole and separate use of my niece, *Anna Maria Conolly*, daughter of my sister late *Catherine O'Donel*, wife of *Martin Conolly*, from

the debts and engagements of her said husband, or any other she may hereafter marry: and further, if she dies without issue by her said husband, or any other she may hereafter take, the said sum of 2000*l.* shall be divided" equally between *Margaret O'Donel*, and certain other of the children of *Lady Catherine O'Donel*.

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objects of the power. Held: that *A.* was absolutely entitled to the 2000*l.*

Lady Anna Maria Johnston died in March, 1835, without ever having had any issue.

The Master reported that under the wills of *Richard Earl Annesley* and *Lady Anna Maria Johnston*, the defendant, *Anna Maria Connolly*, was absolutely entitled to the said sum of 2000*l.*

To this an exception was taken by *Edward Kennedy*, executor of *Margaret O'Donel*, on the ground that the Master should have reported that *Anna Maria Connolly* was entitled for her life only to the interest on the said sum of 2000*l.*: and that said sum should be invested in trust for her for life; and in case she should die without issue living at the time of her decease, then in trust for the other children of *Lady Catherine O'Donel*, in that behalf mentioned in the will of *Lady Anna Maria Johnston*.

Mr. Martley and *Mr. Drury*, for *Edward Kennedy*.

Argument.

This is an absolute gift to *Mrs. Connolly*, with a good executory bequest over to her sisters. The word 'issue' must be construed to mean 'children'. The limited construction is favoured by the Court. Here the expressions point to a particular description of issue, viz., by her then present, or any future husband; and when the testatrix

1845. speaks of issue in connexion with the parent, she must mean children; *Sibley v. Perry*(a); *Pruett v. Osborne*(b); *Hampson v. Brandwood*(c). In another part of the same will, the testatrix makes use of the word issue as synonymous with children. She appoints 1200*l.* and other money to her children, and in case she should die without leaving any such issue, then over. The same word must receive the same interpretation throughout the will. *Cursham v. Newland*(d); *Leeming v. Sherrett*(e).

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—
Argument.

THE LORD CHANCELLOR :—

This question is wholly free from doubt. As regards the general question, it is much too late to be argued that a gift over, in default of issue, is good. It is said that the primary meaning of the word issue is, in this will, restricted to children, by reason of the context; for the gift over is in case = Mrs. Connolly should die without issue by her then present or any future husband. I do not understand the force of that argument. In what other way could there be issue than by her present or future husband. The expression includes all the issue; and therefore I see no question upon the terms of the gift itself. But then it is said that the word 'issue' has been translated by the testatrix herself as synonymous with 'children;' and for the purpose of proving that, another gift in her will is referred to, in which she makes a gift to her own children, with a gift over in case she should die without leaving such issue. There is no doubt as to the meaning of the word in that clause; but there the gift over is not in case she should die without leaving issue, but in case

she should die without leaving *such* issue. It cannot be inferred from thence that the testatrix, when she made use of the word issue in other parts of her will, meant children. None of the authorities come up to this case; they are all distinguishable from it. I think that the report is right, and that the exception must be overruled.

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Extract from the Decree.—No rule on the first, second and third exceptions, taken by the defendants, the Reverend *George Murray M'Dowell Johnston(a)*, the Reverend *Walter Gibs* and *Arthur Maguire(b)*; and let the deposit be paid back: and declare the said defendants entitled to credit for the sum of 2150*l.*, late currency, in the report and fifth schedule thereunto annexed, mentioned. Allow the fourth exception. Allow the fifth exception taken by the said defendants; and declare that the Honourable *F. C. Annesley*, Lady *Catherine O'Donel* and Lady *Anna Maria Johnston*, the legatees for life, were entitled, according to the true construction of the deed of the 13th day of May, 1823, and the will of the said *Richard Earl Annesley*, and the two codicils thereto annexed, to the sum of 3467*l.* 1*s.* 5*d.* the amount of the three years' interest which accrued after the decease of *Richard Earl Annesley* on the sum of 25,040*l.* in the report mentioned: and declare that the sums paid to them by the executors of the said Earl, on foot thereof, were properly paid; and that the said executors ought to be allowed credit for the same. Let the said sum of 2150*l.*, late currency, being equivalent to the sum of 1984*l.* 2*s.* 4*d.*, present currency, and the said sum of 3467*l.* 1*s.* 5*d.*, in the said exception mentioned, be deducted from the sum of 5721*l.* 5*s.* 11*d.*, the amount charged

Decree.

(a) Executor of Lady *Anna Maria Johnston*.

(b) Administrators of the Rev. *Arthur Maguire*.

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against the executors as having been retained or misapplied by them; and let the defendants, the Reverend *G. H. M'Dowd Johnston*, the Reverend *W. Gibs* and the Reverend *A. Maguire*, give credit for the balance of the said sum of 572*l.* 5*s.* 11*d.*, amounting to the sum of 269*l.* 12*s.* 2*d.* out of their costs in this cause hereby decreed to them and declare them entitled to charge such payment or allowance of said sum of 269*l.* 12*s.* 2*d.* against the personal estate of their testators, Lady *Anna Maria Johnston* and the Reverend *Arthur Maguire*. Overrule the exception taken by the said *John Robert Moore*, and pay the deposit to the plaintiff: and declare the said *John Robert Moore* entitled to be paid the sum of 2445*l.*(a) in said report mentioned together with interest on the respective quarterly payments of 105*l.* each, in said report mentioned, composing the sum of 2415*l.*, part of the said sum of 2445*l.*, from the time that the same were respectively paid by him to *Sophia Countess Annesley*, in the report mentioned, at the rate five per cent. per annum, and also such further sums as he may have paid since the 1st day of March, 1844, with interest thereon, at the rate aforesaid, out of the sum 16,617*l.* 15*s.* 8*d.*, Government three and a-quarter per cent Stock, now in the Bank of Ireland to the credit of the firm cause. And refer it to the Master to take an account of such payments and interest; also to inquire and report what sum will be sufficient to be retained for the purpose of paying the accruing instalments of the annuity of 455*l.* a-year in late currency, payable to the said *Sophia Countess Annesley*, by first applying the interest and then sinking the principal. And let such sum as the Master shall report sufficient for that purpose, be set apart out of the residue

(a) This is the aggregate of the 2415*l.*, present currency, before mentioned, and 30*l.* costs of proving the charge of *J. R. Moore*.

the sum of 16,615*l.* 15*s.* 8*d.*, stock, and be transferred to the credit of the first cause, and the separate credit of *John Robert Moore*: and let the said *John Robert Moore* be paid out of such sum as shall be so set apart, and the dividends to accrue due thereon and on the balances thereof, such further quarterly instalments of 105*l.* each, as he may, from time to time, pay to the said *Sophia Countess Annesley* on foot of the said annuity. Overrule the exceptions taken by the defendant, *Mary O'Donel*, and let the deposit be paid to the plaintiff; and declare the sum of 1000*l.*, bequeathed by the will of Lady *Catherine O'Donel*, in the report named, to the defendant *W. Young* and the late defendant, the Reverend *A. Maguire*, in trust for the said defendant, to be valid, and to take effect in case the said defendant shall leave the convent into which she has retired, and that she shall come amongst her friends. Overrule the exception taken by the defendant, *A. E. Kennedy*, and pay the deposit to the defendant, *A. M. Connolly*.

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THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS *v.* WYBRANTS.

Testator devised lands to trustees and their heirs, upon trust to grant and convey the same to the use of *J. W.* for life, subject nevertheless to, and charged with four annuities, to commence upon the death of *X.*; three of which were to be paid to three different charitable institutions (two of them being corporate bodies), and the fourth to the poor of a parish: and after the death of *J. W.*, subject to the annuities, to the use of his first and other sons in tail: and he directed said several annuities to be paid (not saying by whom) on the days therein mentioned; and expressly charged his estate with the same.

JOSEPH WRIGHT, being seised in fee of the lands of Rogerstown and Ballinlagh, in the King's County, and of other lands, made his will, dated the 19th of July, 1793, and thereby gave and bequeathed all his messuages, houses, lands, tenements and hereditaments in the kingdom of Ireland, and all his estate, right, title and interest, in and to the same and every part thereof, whether the same be lands of inheritance or leases for lives, with or without covenant of renewal, unto *Joshua Paul Meredyth* and *William Foster*, their heirs and assigns, according to such estate and interest as he had therein respectively; in trust and to the intent that his said trustees, and the survivor of them, and his heirs, should, in convenient time after his decease, by good and sufficient conveyances and assurances in the law, grant, convey, assure and settle the same, and every part thereof, so far as the law would allow and the nature of his estates and titles would admit, to and for such uses, upon such trusts, and to and for such intents and purposes,

X. died more than twenty years before the filing of the bill to establish the charitable devises, and no payment or other satisfaction was ever made on foot of the annuities. No conveyance had been executed by the trustees; but *J. W.* had, since the death of the testator, been in possession of the estates; and he and his eldest son suffered a recovery and resettled them.

Held, that the right to recover the annuities was not barred by the 3 & 4 Will. IV., c. 27; the trust for the charities being an express one, within the meaning of the twenty-fifth section of that Act.

Charities are, equally with other trusts, within the operation of the 3 & 4 Will. IV., c. 27.

Every charge on an estate does not create a trust, although it imposes a burden; but it may create a trust depending on the nature of the charge. If the gift is an express one, and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust.

Where a testator gives an estate to one, subject to a charge, the person to pay the charge is the person who is liable to the burden; and this, in the case of a charity, impresses him with the character of trustee for the charity.

and under and subject to such powers and provisoes as thereafter expressed and declared, or as near thereto as the deaths of parties and alteration of circumstances would admit of. And after declaring the trusts upon which his Monaghan estates were to be conveyed, the testator proceeded thus: "And as to my estates and lands of Rogerstown and Ballinlagh, in the King's County, in trust that my said trustees, and the survivor of them, and the heirs of such survivor, shall grant and convey the same to the use and behoof of *Joseph Henry Wybrants*, eldest son of *John Wybrants*, of, &c., by his present wife, *Sarah Wybrants*, and his assigns, for and during his natural life; with remainder to trustees and their heirs, during his life, to preserve contingent remainders; subject, nevertheless, to, and charged and chargeable with, one annuity of 20*l.* yearly to the said *Sarah Wybrants*, wife of the above-mentioned *John Wybrants*, during her natural life, in lieu of the like annuity of 20*l.* yearly, settled upon her at her intermarriage with the said *John Wybrants*, by a deed bearing date, &c.: and also subject to, and charged and chargeable with, one other annuity of 30*l.* yearly, to be paid out of the rents of the said lands of Rogerstown and Ballinlagh to the said *Sarah Wybrants* during her natural life; the said two annuities of 20*l.* and 30*l.* to be paid" to her separate use, upon the days therein mentioned: "and from and immediately after her decease, subject to, and charged and chargeable with one annuity of 25*l.* yearly, to be paid to the trustees or governors of the Lying-in Hospital, in Great Britain-street, Dublin, for the use of the said charity; and also subject to, and charged and chargeable with one other annuity of 25*l.* yearly, to be paid out of the rents of the said lands of Rogerstown and Ballinlagh, to the governors of the Hibernian Marine Society in Dublin, for the use of

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the said charity ; and from and immediately after my decease, subject to, and charged and chargeable with one annuity of 20*l.* yearly, to be paid to *John Bowers*, my servant, during his natural life ; and from and immediately after his decease, subject to, and charged and chargeable with, one annuity of 20*l.* yearly, to be paid to the governors or treasurer of the King's County Infirmary ; and also subject to, and charged and chargeable with one other annuity of 5*l.* yearly to the poor of the parish in which said lands of Rogerstown and Ballinlagh are situated : and from and after the death of the said *Joseph Henry Wybrants*, subject to the said several annuities, to the use and behoof of " his first and other sons in tail male : " and for default of such issue, to the use and behoof of *John Wybrants*, second son of the aforesaid *John Wybrants*, for his life ; with remainder to trustees and their heirs, during his life, to preserve contingent remainders ; and from and after the death of *John Wybrants*, subject to the said several annuities, to the use of " his first and other sons in tail male : " and for default of such issue, subject to the said several annuities, to the use " of the third and other sons of *John Wybrants*, by his then present wife, *Sarah Wybrants*, in tail male : " and for default of such issue, to the use and behoof of my own right heirs, subject, nevertheless, and charged and chargeable with the said four annuities of 25*l.*, 25*l.*, 20*l.*, and 5*l.*, last mentioned : and I do hereby order and direct that the said several annuities shall, after my death, be paid half-yearly ; the first payment of each to be made on the first day of January or first day of July after my death, that shall first happen : and I charge and encumber my said several estates, lands and premises thereinbefore mentioned, with the said several annuities for the purposes hereinbefore expressed concerning the

same." And he empowered his trustees, and the survivor of them, and his heirs, and the person who should be in possession of any of his estates, by virtue of any of the limitations aforesaid, to make leases thereof as therein mentioned.

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Joseph Wright, the testator, died in January, 1796; and thereupon *Joseph Henry Wybrants*, by *Joseph Wybrants*, his father and guardian, entered into possession of the lands. He attained his age of twenty-one years in 1807, and thereupon personally entered into, and still was in possession of the lands. *Sarah Wybrants* died in November, 1815, and *John Bowers* died in September, 1817.

Shortly after the decease of the testator, his will was proved in the Prerogative Court, Dublin; and in May, 1796, advertisements were inserted in the Dublin Gazette, stating the full particulars of the charitable bequests thereby made.

No payment was ever made on account of any of the before mentioned charitable bequests; nor was any application made for payment until shortly before the filing of the present bill. No conveyance of the legal estate had been executed by the trustees under the will.

The bill was filed on the 28th of October, 1843, against *Joseph Henry Wybrants*, *Thomas Wybrants*, his son, who was entitled, under family settlements and a recovery duly suffered, to the remainder in fee, expectant upon the life estate of his father, and against *Joshua Colles Meredyth*, the heir-at-law of the surviving trustee: and the plaintiffs thereby prayed that the said charitable devises and be-

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quests might be established, and the said respective annuities or rent-charges declared to be well charged on the said lands and premises: and that the trusts of the said will might be carried into execution, and all proper and necessary deeds and conveyances executed for the purposes aforesaid: and for an account of the sums due on foot of the several annuities or rent-charges so devised and bequeathed for the charitable purposes aforesaid; and that the same might be decreed to be well charged on the premises and for a receiver: and that, if necessary, *Joshua Collis Meredyth* might be removed from the trusts, and new trustees appointed.

The defendants, *Joseph Henry Wybrants* and *Thomas Wybrants*, relied upon the length of time and the Statute of Limitations, as a bar to the entire relief sought by the bill in respect of the annuities; more than twenty years having elapsed since the deaths of *Sarah Wybrants* and *John Bowers*, without any payment or other satisfaction having been made or given during said period to any person whomsoever, on foot of such annuities, or any of them: and they insisted, that, supposing the said several annuities were not wholly barred by length of time, yet that the plaintiffs were not entitled to recover more than six years' arrears of said respective annuities: and they relied on the Statute of Limitations in bar to any further relief sought by the bill in relation to the arrears of the annuities.

The defendant, *Meredyth*, by his answer, stated that he believed that the legal estate in the lands was then vested in him.

The Lying-in Hospital and the Hibernian Marine So

cety were corporate bodies; the other objects of the testator's charity were not.

Mr. Robert Warren and Mr. Thomas Lefroy, for the plaintiffs.

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The first question is, whether charities are or are not within the 3 & 4 Will. IV., c. 27 : the second, if they are, whether this is not an express trust within the saving of the twenty-fifth section of the Statute. There is no decision upon the first question. It was raised in *The Incorporated Society v. Richards(a)*, and *The Attorney-General v. Perse(b)*, but not decided; but the impression of your Lordship's mind then was, that the case of charities was a *casus omissus*. There is great difficulty in applying the Statute to charities. In *The Incorporated Society v. Richards* your Lordship says: "In numerous cases where, by reason of the defect in the appointment of a trustee or from the want of one, there is no person to represent the charity, who is to make the claim. The objects of the charity cannot, frequently they are not defined, and have no right until called into existence, as objects, by the trustee."

Mr. Moore, Mr. Brooke, and Mr. Martley for J. H. Wybrants and Thomas Wybrants.

There was no difficulty in the way of two of the charities suing in their own names for the annuities devised to them; for they are corporate bodies.

Charities are within the 3 & 4 Will. IV., c. 27. The interpretation clause (sec. 1), shows that in passing this Act, the attention of the Legislature was directed to the

(a) 1 D. & War. 258.

(b) 2 D. & War. 67.

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subject of charities. It speaks of Eleemosynary Corporations. "Land" is explained to extend to all corporea hereditaments whatsoever, and tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) and "rent" to extend to all annuities and periodical sums of money charged upon or payable out of any land (except moduses and compositions belonging to a spiritual or eleemosynary corporation sole). The case of spiritual and eleemosynary corporations sole is provided for by sec. 29; but the express exception of property belonging to eleemosynary corporations sole, from the signification given by sec. 1 to the words "land" and "rent" leads to the inference that those words include every other description of real property. Then the word "person" is explained to extend to "a body politic, corporate, or collegiate, and to a class of creditor or other persons, as well as an individual:" words sufficiently extensive to include all eleemosynary corporation aggregate, and trusts for charities. Eleemosynary corporations aggregate, and trusts for charities, are not excepted from the operation of the general provisions of the Act, and no special enactment is made to meet their case; the general provisions of the Statute are sufficiently comprehensive to embrace them; and they are within the mischief intended to be remedied: the Court ought, therefore, to require the most clear and satisfactory proof that they are not within the provisions of the Statute. The 3 & 4 Will. IV., c. 27, was one of a series of Acts passed for the limitation of actions; and the other Statutes on that subject, the 2 & 3 Will. IV., c. 71, and 2 & 3 Will. IV., c. 100, apply to corporations sole and aggregate, temporal and spiritual. It is objected that the persons to whom these funds are given do not claim for themselves, but for the objects of charity; and that it could not be intended to conclude the

objects of the charity by the neglect of their trustees : but eleemosynary corporations sole are subject to the same objection ; nevertheless the legislature has, in their case, limited the time for making an entry or distress on the lands ; giving, however, a more extended period for that purpose, because of the peculiar nature of a corporation sole. The inference from this is, that they intended to leave eleemosynary corporations aggregate to the operation of the general provisions of the Act. In *The Attorney-General v. Persse*(a), the Court answered the objection raised by itself in *The Incorporated Society v. Richards*(b), that there was no person entitled to the benefit of the charity until an object of it was called into existence by the trustee. There a rent-charge was devised as a salary for a schoolmaster ; and it was held that the Statute did not begin to run until a schoolmaster was appointed. The construction put on the Statute, in that case, meets the only real difficulty in the application of the Statute to charities : that difficulty does not, however, arise here ; for the different charitable institutions, mentioned in the will, might, at any time, have asserted their right. Neither is this case saved by the operation of the twenty-fifth section. The defendants are not trustees in whom the annuity is vested for the benefit of the charity. If this case be within the twenty-fifth section, then no annuity charged upon the estate of another person can be barred ; for the owner of the estate would be a trustee for the person having the charge.

Mr. *Lefroy*, in reply.

It is not sufficient that in the definition of the word "person" there are words sufficient to embrace charities, unless it be

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(a) 2 D. & War. 67.

(b) 1 D. & War. 258.

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shown that the words will embrace every class of charities. That definition is inapplicable to such a body of persons as the poor of a parish, who cannot sue for a charitable bequest. That consideration removes the force of the argument derived from the first section, and affords a strong ground for inferring that the legislature did not intend to include charities in the Statute. The policy of the law has always been to favour charities; *Mills v. Farmer*(a). Before this Statute there were two classes of cases with which Courts of Equity did not deal on the principle of analogy, which they applied to other cases, viz., charities and express trusts. The legislature has now imposed a limitation in the case of express trusts, but charities are left as they were before the Act. That charities are not within the 3 & 4 Will. IV., c. 27, is to be inferred from *The Attorney-General v. Kerr*(b), *The Attorney-General v. Brettingham*(c), and *The Attorney-General v. Christ's Hospital*(d), in which, although length of time was relied on, the Statute was not set up as a defence, though it was applicable if charities were within it.

But if charities are within the Statute, then it is submitted that this is an express trust within the meaning of the twenty-fifth section, and is not barred by the operation of that section. Where the trust appears on the face of the instrument itself, it is an express trust within this Statute; *Salter v. Cavanagh*(e). The charge of the annuity on the lands in itself created a trust. In *The Attorney-General v. Persse*, the testator charged his lands with an annuity to be paid as a salary to a schoolmaster; and devised the

lands to the defendant; and your Lordship, in giving judgment, said: "The charge is, of itself, a trust; like the common and ordinary case of a charge of debts, which, in the view of this Court, creates a trust for their payment." [THE LORD CHANCELLOR:—I did not use those words in the sense you put on them. I did not decide that if an estate be devised to *A.*, subject to an annuity to *B.*, *A.* is a trustee for *B.*] In *Knox v. Kelly(a)*, it was held that where lands were devised, charged with the payment of a legacy, the trust was an express one. Here also the lands are devised to trustees, upon trust to convey them to the defendants, subject to the annuities. That trust has not as yet been executed: the legal estate still remains in the trustees: their right is not barred, for the possession of *J. H. Wybrants* is the possession of the trustee. This is, therefore, a trust which the plaintiffs, representing the annuitants, are now entitled to call on the trustee to perform. The trustee can only perform it by conveying the lands subject to the annuities. How can the right of the annuitants to the annuities be barred, when the right of the defendants to the estate is not barred? In *Ward v. Arch(b)*, lands were devised to trustees, in trust to sell, and, out of the interest of the proceeds and the rents of the estates, to pay annuities; the trustees entered into possession of the estates, but, for more than twenty years, did not pay the annuities; and it was held that the annuitants were not barred by the Statute. So, in *Phillipo v. Munnings(c)*, where an executor set apart, out of the assets, a sum of money, equal in amount to a legacy given by the will, and invested it, and paid the interest for some time to the persons beneficially entitled, it was held that the Statute did not

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(a) 6 Ir. Eq. R. 79.

(c) 5 M. & C. 16.

(b) 12 Sim. 42.

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bar the persons beneficially entitled from maintaining a suit against him for the amount, though more than twenty years had elapsed since the last payment on foot of it : and in *The Attorney-General v. The Fishmongers' Company*(a), it was held, that if there be no doubt of the origin and existence of a trust, the Court will not allow lapse of time to enable those who are mere trustees, to appropriate to themselves that which is the property of others.

Mr. *Martley*, by leave of the Court, replied to the authorities cited by Mr. *Lefroy*, and which were not referred to in opening the case.

The Attorney-General v. Kerr, and *The Attorney-General v. Brettingham*, were decided on the ground that the trustees of the charity had committed a breach of trust in alienating the property, of which the defendants had notice. The information in *The Attorney-General v. Brettingham* were filed within the five years given by the fifteenth section of the Statute ; and it is probable that the information in the other case was also filed within that time. *Ward v. Arch* was the case of an express trust within the twenty-fifth section ; the fifteenth section was also there relied on. *Philippo v. Munnings* does not bear upon the present case ; and *Salter v. Cavanagh* was decided entirely on the ground that the trust there was an express one.

Then, as to the principal question in the case. The twenty-fourth section puts equitable estates on the same footing as legal estates are put by the former sections of the Statute. Suppose, then, that lands were granted to a corporate body,

(a) 2 M. & C. 309.

which could only take lands in trust for a charity ; and that, at law, the right of the corporation to recover the rent was barred by the operation of the Statute, would the charitable purpose for which the lands were granted, take the case, in a Court of Equity, out of the bar of the Statute ? To hold that it could, would be to give a different construction to the Statute in a Court of Law and a Court of Equity. A Court of Law can look at the legal estate only ; it cannot take into consideration the purposes for which it was granted. The twenty-fourth section brought all trusts within the operation of the previous sections of the Statute ; but as those sections would operate unjustly as between trustee and *cestui que trust*, in the case of express trusts, therefore the twenty-fifth section was enacted ; but it was confined to the case of express trusts, leaving charities as they stood under the previous sections.

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Then, as to whether this is an express trust or not: the distinction between a charge and a trust is pointed out in *King v. Denison(a)*. In the case of an express trust, as where an estate is conveyed to the use of *A.*, in trust for *B.*, no time, as between the trustee and *cestui que trust* will bar the equitable right of the latter ; *Llewellyn v. Mackworth(b)* ; *Townsend v. Townsend(c)*. This is only a charge of the annuities on the lands ; the direction to the trustees to convey would be satisfied by conveying the estate, *subject* to the annuities : and in this court the question must be considered as if the conveyance had been actually made. The owners of the estate are not trustees for the annuitants ; they are strangers to them ; and the case is not within the twenty-fifth section. It might as well be argued

(a) 1 V. & B. 260.

(c) 1 B. C. C. 551.

(b) Barnar. 449.

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that no annuity, charged by will on land, was within the operation of the Act; but *James v. Salter*(a) decides that it is.

THE LORD CHANCELLOR :—

I shall consider this case: it is one of great importance. I cannot send it to a Court of Law; for it may be, though there is no remedy at law, that in equity I must adopt a different rule.

Judgment.

THE LORD CHANCELLOR :—

The question in this case is, whether the annuities given by the will of Mr. *Wright*, in 1793, have been barred by the new Statute of Limitations. There was no concealment, as the gifts were advertised three times in the *Dublin Gazette*, in May, 1796.

As to the general question; before the late Statute of Limitations, time did not run against charities in this Court. *Moore*, in his reading on the Statute of *Elizabeth* in *Duke*, lays it down, “that if the heir of the disseisor be in by descent of lands given to a charitable use, yet he shall be bound by the decree; for no laches of entry shall ever destroy a charitable use, nor any thing bar it but a conveyance to one upon good consideration, and without fraud or notice. Neither is a charitable use bound to the times expressed in the Statute of Limitations, made 32 Hen. VIII c. 2., nor to that of 21 Jac.” At law, the old Statute of Limitations operated against all claimants, although they held in trust for charities; but in this Court, unless in the case of a purchaser for value without notice, they had no operation; and, as we have seen, laches did not affect the

(a) 3 B. N. C. 544.

right to the charity funds. The rules, as stated by *Moore*, were the law of this Court down to the passing of the recent Statute.

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This Statute (3 & 4 Will. IV., c. 27) bars all legal rights, and does not contain any saving in favour of charities. No person is to make any entry or distress, except within the period there specified; and this word "person" extends to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual. The old Statutes of Limitations did not bar a legal rent-charge, and, therefore, there was no bar in equity of an equitable rent-charge or annuity out of land; *Stackhouse v. Barnston*(a): but such interests are expressly bound by the recent Statute; and I shall, therefore, assume that the right to the annuities in this case, if legal, is bound at law. Now the old Statutes did not interfere with equitable rights; but equity, in analogy to the legal provisions, held time to be a bar, except in some peculiar cases, of which charity was the leading one. The new Statute no longer left Courts of Equity to act by analogy; but expressly enacted that no person, claiming any land or rent in Equity, should bring any suit to recover the same, but within the period during which, by virtue of the provisions in the Act, he might have made an entry or distress, or brought an action to recover the same, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in Equity. This, therefore, is quite as imperative as the enactment binding legal estates. No person can bring any suit but within the legal limitation. This leaves to equity no discretion. The Statute deals generally with equitable rights, and treats them thus far on the

(a) 10 Ves. 467.

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footing of legal interests. Then comes the exception in section twenty-five :—That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* to bring a suit against the trustees, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and then be deemed to have accrued only as against such purchaser, and any person claiming through him. And the Statute then provides for the case of fraud. Now it appears to me that, unless the case can be brought within this saving, which operates between trustee and *cestui que trust*, it would fall within the general prohibition in section twenty-four. For charities were only saved in equity from the operation of the former Statutes, as trusts, although highly favoured ones : and now all trusts are barred by section twenty-four, unless saved by twenty-five ; and I am not at liberty to introduce an exception into the Act, which the Legislature, providing generally for all trusts, have not thought it proper to enact.

In the case of *Salter v. Cavanagh*, it seems to have been held that an implied trust is an express one within the Act, where it arises upon the face of the instrument itself, and is not to be made out by evidence ; but upon this point I am not called upon to give any opinion. In *Phillipo v. Munnings* the trust was an express one ; and it was held that the trustee was bound by it, although he was an executor also, and appropriated the legacy as such.

In this case the testator devised all his estates to trustees,

to grant, convey and settle the same to certain uses in strict settlement; subject to and charged and chargeable with some annuities for life to individuals, and to the annuities for charitable purposes; several to institutions of which there are governors, and one to the poor of a parish. It was considered throughout the argument, that the legal estate was still in the trustees, no legal conveyance ever having been executed. Is, then, the provision for the annuities to charities an express trust within section twenty-five? It certainly is so if the trust to convey is to be considered as still in existence: for the conveyance can only be properly made by securing the annuities; and the trustees have a power of leasing; and there is a direction to pay the annuities which would apply to the trustees. They are trustees for the trusts declared until they convey; and these are all express trusts.

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If the case is now to be considered as if the devisees of the beneficial interest had acquired the legal estate subject to the charge, I should still be of opinion in favour of the charities. In the first place, the devisees must be considered to have acquired the legal estate from the trustees; and if not, yet the charge for the charities would, I think, create what in this Court must be deemed an express trust within section twenty-five. The gift is an express one; and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust. It certainly is not necessary to use the word "trust" in order to create an express trust. I do not intend to lay it down that every charge creates a trust, although it imposes a burden; but a charge *may* create a trust; depending on the nature of the charge. In *Bailey v. Ekins*(a) Lord Eldon said he was

(a) 7 Ves. 323.

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confident Lord *Thurlow's* opinion was, that a charge (debts) is a devise of the estate, in substance and effect *pro tanto* upon trust to pay the debts: and this is supported by the current of authorities. The principle is less powerful in the case of charities, particularly where the charity is to a fluctuating, uncertain body, like the poor of a parish. The testator gives the estate to one, subject to this charge. Who is to pay the annuities but the person who is liable to the burden: and this, in the case of a charity, impresses him with the character of a trustee for the charity. By the ancient rule of Equity, no one could acquire an estate, with notice of a charitable use, without being liable to it. The Statute has not altered the rule of Equity; which must still prevail where the charity is not bound by section twenty-four, or is within the saving in section twenty-five. The doctrine in *Mills v. Farmer*(a) shows how much more favourably, in many respects, a legacy to a charity is to be construed than a legacy to an ordinary legatee. The distinctions taken by Lord *Eldon*, in *Kee v. Denison*(b), between a direct trust and a charge, were with reference to a resulting trust, in favour of the heir.

Upon the whole, therefore, I have satisfied myself that even upon the strict construction of the Statute, the plaintiffs are entitled to the relief which they pray. This is not a case in which the annuities were given to trustees for the charities, and the estate itself, subject to the annuities, was given to other persons beneficially. If that case should arise, it may be found more difficult to relieve the charities in this Court, where time has operated against the trustees of the annuities as a legal bar.

(a) 19 Ves. 483.

(b) 1 Ves. & B. 260.

FOZIER *v.* ANDREWS.

1845.

Jan. 18.

THE bill was filed by a *cestui que trust* against his trustee, for an account and a reconveyance. Upon taking the accounts, the sum claimed by the defendant was considerably reduced; but there still remained a balance due to him. The cause having come on to be heard on report and merits.

If a trustee has not misconducted himself, even though the Court punish him, as by making him pay interest on funds in his hands, yet he shall get the costs of the suit: but if his account be greatly reduced in the office, he shall not get the costs of passing it.

Mr. *Dickson* and Mr. *R. Fergusson*, for the plaintiff, asked for the costs of the suit against the defendant, on the ground that the plaintiff had succeeded in the suit, and had greatly reduced the sum claimed by the defendant.

Mr. *Moore* and Mr. *Darley*, for the defendant, stated, *Argument.* that his claim had been cut down in the office, because certain sums of money, which were advanced by him for the maintenance of the plaintiff, beyond the amount of his income, had not been allowed; and that no misconduct was imputable to him: and they cited *Trevor v. Townsend*(a) and *Tebbs v. Carpenter*(b).

THE LORD CHANCELLOR :—

It is said that the costs of this suit ought to abide the general rule, and be given to the successful party: but in *Judgment.*

(a) 1 Mol. 496.

(b) 1 Mad. 290.

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every case in which a *cestui que trust* files a bill for an account against his trustee, he must succeed in obtaining decree; for as the relative situations of the parties cannot be denied, the matter must go to the Master. I believe the rule is general, that, if the trustee has not misconducted himself, even though the Court punish him, as by making him pay interest on funds in his hands, yet he shall get the costs of the suit. Here the trustee cannot be said to have misconducted himself; but he has made charges in his account which cannot be maintained. As to some of those charges, however, for instance those for maintenance the demand of the trustee has been disallowed, not by reason of its injustice, but because of the limited amount of the fund to answer the demand: the justice of the claim was established, although the amount of the demand was reduced. This, therefore, is not a case for costs against the trustee; on the contrary, I think that, according to the general rule, he ought to have his costs: but as, in the office, he has set up claims for large demands which he has not been able to establish, and as the Master has, in my opinion, acted properly in disallowing them, I shall in this case make the same distinction as was made in *Tebbs v. Carpenter*, and give him the costs of the suit generally with the exception of the costs of the account in the Master's office.

O'BRIEN v. MAHON.

O'BRIEN v. MOLLOY.

1845.

Jan. 22.

THE bill was filed by a judgment creditor against the real and personal representatives of the conusor. One of the persons interested in the real estate had been discharged as an insolvent; and *J. Mitchell*, the late Provisional Assignee of the Insolvent Court, was made a party to the suit, in respect of his interest. *J. Mitchell* afterwards died; and *J. S. Molloy* was appointed Provisional Assignee in his place. He was made a party to the proceedings by bill of revivor merely.

Where the Provisional Assignee of the Insolvent Court is a party defendant to a suit, and dies, the new Provisional Assignee may be made a party by revivor merely.

Mr. *Thomas Fitzgerald* for *Henry Mahon*, the principal defendant, objected that the Provisional Assignee should have been made a party to the suit by supplemental bill, and not by bill of revivor merely. He cited *Harris v. Pollard*(a) to show that the objection might be made notwithstanding the order to revive; and *Anonymous*(b); 2 Eq. Ca. Abr. Abatement, B. pl. 7; and *Meagher v. O'Mara*(c), to show that the new Provisional Assignee should have been made a party by supplemental bill.

Argument.

THE LORD CHANCELLOR:—These authorities do not apply to the case, as the law now stands. When they were decided, it was necessary that there should be a conveyance from the representatives of the old, to the new assignee: but by the present Insolvent Act, the estate is at once vested in the new assignee upon his appointment, without any conveyance.

(a) 3 P. Wms. 348.

(b) 4 Eq. Ca. Abr. 209.

(c) Flan. & Kel. 269.

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Mr. *Moore* and Mr. *J. J. Murphy*, for the plaintiff, cited *M^cCollum v. Crawford(a)*, where it was held, that the new Provisional Assignee might be made a party to the suit by bill of revivor merely; and *M^cTiernan v. Bell(b)*, where a new administrator *de bonis non* was allowed to be made a party to the suit by bill of revivor. They also insisted that it was not competent for a co-defendant to make this objection.

Mr. *Fitzgerald* in reply. *M^cCollum v. Crawford* was decided upon an alleged practice of the Court of Exchequer, which is not known in this Court. The objection is open to a co-defendant; it is tantamount to an objection of want of parties.

THE LORD CHANCELLOR :—

Judgment.

As this point has been decided by the Court of Exchequer, I will not reconsider it. I will take the practice of that Court from its decision; and they having held that it was according to their practice to bring the new Provisional Assignee before the Court by bill of revivor, I shall adopt the same practice; and I see no reason to hold otherwise. In this case the Provisional Assignee does not object to the mode in which he has been made a party to the suit; and he submits to such decree as the Court may think fit to pronounce. I, therefore, think that it is not competent for a co-defendant to make the objection. I am very little disposed to yield to such an objection; and, on the grounds I have mentioned, I over-rule it.

(a) 6 Ir. Eq. R. 217.

(b) 3 Ir. Eq. R. 193.

BOYD v. MURDOCK.

1845.

Jan. 27.

UPON the marriage of *George Murdock* with *Frances Swift*, his second wife, an indenture of the 7th of May, 1806, was executed, whereby, in consideration of the marriage and of the marriage portion of *Frances Swift*, *George Murdock* conveyed to trustees and their heirs, certain houses and premises in the town of Newry, of which he was seised to him and his heirs under a lease for lives renewable for ever; and also a dwelling-house and offices in Belfast, held by him under a lease for a long term of years, and the furniture therein, upon trust to permit him to use and enjoy the same, and to receive and take the rents and profits thereof during his life: and, as to the houses and premises in Newry, after his decease, in case his intended wife should survive him, to levy and raise thereout, by sale or mortgage, a sum of 500*l.*, and pay same to *Frances Swift* for her own use: and as to the dwelling-house in Belfast, in trust for *Frances Swift* and the issue of the marriage, in equal shares and proportions, share and share alike. And it was provided, that in case *George Murdock* should cause a sum of 500*l.* to be insured on his life for the benefit of *Frances Swift*, and should during his life pay the premiums thereon, so that *Frances Swift*, if she survived him, should actually receive, under the policy, the sum of 500*l.*, then the grant and release of the premises in Newry should be null and void: but in case *George Murdock* should omit to insure said sum on his life, or should omit to pay the premiums, then not only the tenements and premises in Newry, but also all such estate, property and effects as *George Murdock* then was,

Testator devised his freehold lands to his wife and children equally; and appointed her his trustee. Under her marriage settlement, the wife was entitled to a sum of 500*l.*, charged on the land, and payable on the death of the testator. She entered into receipt of the rents, as devisee and trustee in the will:—*Held*, that, as against a subsequent judgment creditor, with whose consent she entered, and who acted gratuitously as her solicitor, in the matter of the trusts of the will, she was chargeable only with such parts of the rents as she had received and applied to her own use.

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MURDOCK.
—
Statement.

or thereafter should become possessed of, should stand and remain to the trustees, their heirs, executors, &c., as pledge and security for the payment of said sum of 500*l*. *Frances Swift*: and the trustees were thereby according authorized and empowered to levy and raise the same thereout.

No insurance was effected pursuant to the proviso in the settlement.

George Murdock was also seised for the term of his own life, with the reversion in fee, and *quasi* fee, expectant on the decease of his grandson, *George Gordon Murdock*, without issue, in the lands of Cloughanramer, a fee simple estate, and certain other premises in Newry called the Meeting-house, held under a lease for lives renewable for ever: and by indenture of mortgage of the 24th June, 1820, *George Murdock* and *George Gordon Murdock*, according to their several estates and interests therein, conveyed the said lands, and also the lands conveyed in the settlement of 1806, to *Joseph Glenny* and *Mary Jane Glenny*, administrators of *William Glenny* deceased, and their heirs, subject to the charge of 500*l*. mentioned in the deed of 1806, and also subject to redemption upon payment of the sum of 500*l*.

Joseph Glenny died, and *Mary Jane Glenny* married *John Boyd*; who, with his wife, were the plaintiffs in the suit.

George Gordon Murdock died without issue: and afterwards, on the 5th of June, 1824, *George Murdock* died, and by his will, he desired that his wife *Frances* should

and a certain sum of 500*l.*, which was due to her and her children, by her brother *Richard Swift*, to pay off the *Glancys'* mortgage, and get an assignment of the same for the use and benefit of herself and his children: and to enable her to do so, he appointed her and two other persons trustees and executors of his will: and he devised unto his wife *Frances*, their son *G. G. King Murdock*, and their three daughters, and his grand-daughter, all his before-mentioned lands and houses, to go equally between them, share and share alike, and the survivors and survivor of them, and to their heirs. And he desired that his wife should receive all his rents and arrears of rent half-yearly, so as she might always be in cash to answer her daily disbursements for the use of her house and his family, and for the education and clothing of their family. *Frances Murdock* alone proved the will, and entered into the receipt of the rents of the lands devised; but did not call in the 500*l.* due to her and her children by *Richard Swift*.

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Statement.

By the decree in this cause, which was instituted to foreclose the mortgage of 1820, it was referred to the Master to take an account of what was due to the plaintiffs, on foot of the principal sum of 500*l.* in the mortgage of 1820 mentioned; and of the several charges and incumbrances affecting the mortgaged lands prior to the mortgage of 1820; and of the nature and priority of such incumbrances: and also to take an account of the personal estate of *George Murdock*, possessed or received by *Frances Murdock*, his executrix, and of his funeral and testamentary charges and debts.

By his report, the Master found the sum due on foot of the mortgage of 1820, and that it was the first incum-

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brance on the lands of Cloughanramer and the Meatin house premises; and for the reasons thereafter mentioned and in addition thereto, *Frances Murdock* consenting, that it was the prior charge affecting the mortgaged premises. He further found, that on the death of *George Murdock*, his widow, *Frances*, entered into possession of all his real and freehold estates, and into perception and receipt of the rents and profits thereof, from June, 1824, to May, 1840; and that, during that time, she received thereout 3202*l.*; and that out of that she disbursed 1193*l.*; leaving a balance in her hands of 2009 and that, after giving her credit for said disbursements, she had applied to her own use, or, as against the creditors *George Murdock*, misapplied of said rents a sum more than sufficient to pay off and discharge or satisfy the sum of 500*l.* late currency, mentioned in the settlement of 1820 together with the interest thereof: and he therefore found that, as against the creditors of *George Murdock*, *Frances Murdock* ought to be considered as having been paid and satisfied the said sum of 500*l.* and interest.

The Master then reported, that *George Murdock* was not possessed of any personal estate at the time of his death; and that he was at the time of his death indebted on foot of three several judgments, obtained respectively Michaelmas, 1821, Hilary, 1824, and Easter, 1824: the first was obtained by *Joseph and Isaac Ogle Glenney*, who were solicitors, and was then vested in *James Moody*, in trust for the executors of *Joseph Glenney*, one of the mortgagees in the mortgage of 1820.

Frances Murdock excepted to that part of the report

which found that she ought to be considered as having been paid or satisfied the sum of 500*l.*, with interest, charged on the lands for her benefit by the settlement of 1806.

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In support of the exception, evidence of the land-agent of Mrs. *Murdock* was read, who deposed, that Mrs. *Murdock* and her family resided together; that they had no other means of support than the rents of the testator's property; that he received the rents with the knowledge and assent of *Joseph Glenny*, and paid them over to Mrs. *Murdock*, for the use and support of herself and the devisees, with his knowledge.

Several letters of *Joseph Glenny* to Mrs. *Murdock* were read. They bore date at various periods, from the 18th of June, 1824, to the 11th of December, 1830. From them it appeared that he took a friendly interest in her affairs, and advised her as to the management of the testator's property: and in one of them, dated in May, 1825, he said he thought that a compliance with the first injunction in the testator's will would be a good measure, if practicable; "Not that I want to call in the 500*l.*; on the contrary, it is my most sincere wish to do any thing that may be beneficial to yourself and your young numerous family." And in a letter of July, 1824, from *Joseph Glenny* to Mr. *Stewart*, who had been named an executor in the will of *George Murdock*, he said that, "at present, there is no intention of foreclosing the mortgage: if a fund could be raised, without loss to Mrs. *M.* or her children, for payment of it, I would cheerfully adopt it."

Joseph Glenny had been the solicitor of *George Murdock*,

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 Argument.

and as such had prepared the mortgage of 1820; in his transactions with Mrs. *Murdock* he acted gratuitously.

Mr. *Monahan* and Mr. *Lewis Morgan* for Mrs. *Murdock*.

There is no direction in the decree to take an account of the rents of the real estate. The evidence shows that Mrs. *Murdock* entered into receipt of the rents as devisee and trustee under the will of her husband; not as a creditor in respect of the 500*l.* secured to her by her settlement. *Joseph Glenny* intended to charge her as mortgagee in possession, it was his duty to have apprized her of his intention; for he was her solicitor, though acting gratuitously. *Goddart v. Carlisle*(a). This is an attempt to get an account of by-gone rents, which the Court will not sanction. *Thomas v. Brigstocke*(b); *Salt v. Donegal*(c); *Turkington v. Kearnan*(d); *Holton v. Lloyd*(e); *Fitzpatrick v. Hodgson*(f).

Mr. *Moore* and Mr. *Robert Andrews* for the executors *Joseph Glenny*.

If Mrs. *Murdock* was in possession as trustee, it was her duty to apply the rents in payment of the charge of 500*l.* and if as devisee, then she was entitled to one-sixth only in her own right; and she has not shown that she has paid over the other five-sixths to the other devisees.

(a) 9 Pri. 180.

(b) 4 Russ. 64.

(c) Long. & T. 2.

(d) Long. & T. 35.

(e) 1 Mol. 30.

(f) Cr. & D. 236.

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—
Judgment.

THE LORD CHANCELLOR :—

Where a party enters into the possession of real assets, and the capital of the debt is to be raised by sale or mortgage, the practice has always been not to visit the party in possession with an account of rents received by him until it is seen whether it be necessary to do so. If it be necessary, the party who has received the rents must account for them. This is not a question whether the creditor is entitled to an account of the past rents, but whether those rents form part of the assets for the general creditors. The contest here is between *Mrs. Murdock*,—who, under her settlement, is entitled to a sum of 500*l.*, payable, with interest, after the death of her husband, and who is also a devisee under the will of her husband,—and a judgment creditor who happened to have been the solicitor of her husband. It is impossible to represent *Mr. Glenny's* conduct as improper ; it was honest, and kindly intended. No doubt, *Mrs. Murdock* entered into possession under the will, by which she was made a trustee ; but *Mr. Glenny* must be considered as saying that he did call on her to execute the trusts. It would have been most injurious for her to do so, for the rents were not large. I think it must be considered, that he consented to her entry as the devisee of her husband, for the benefit of herself and her children. But he is not to be damnified by that beyond what is necessary to give effect to his intention. I cannot, therefore, say that *Mrs. Murdock* is entitled to a part of those rents, and yet is not to be answerable for them, as applicable to the payment of her own demand ; but it is a different matter to say, after what has passed, that she is to be responsible for that portion of the rents which belonged to her children. I think that whatever properly belonged to her should go in

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reduction of the sum due to her; first in reduction of the interest, and then of the principal. If the children had been made wards, their portions would have been paid into Court, and applied by the Court for their benefit, and would not have gone in extinction of the widow's demand and from his letters it appears, that *Mr. Glenn* considered that he was placing her in the same situation the Court would have done if the children had been made wards.

The difficulty in this case has arisen from the decree having directed an account to be taken of the rents and profits of the real estate. I cannot say that the Master was wrong in the conclusion he has come to. The parties must go back to the Master to ascertain how much of the rents received, *Mrs. Murdock* was entitled to; and how much she has applied to her own use: and to charge her with those sums, to be applied first in reduction of the interest and then of the principal of the 500*l.*

It was afterwards agreed between the parties, that *Mr. Murdock* should accept 400*l.* in satisfaction of her demand on foot of her settlement; and the Court made a decree accordingly.

LORD GUILLAMORE v. O'GRADY.

Jan. 30.

Form of issue, where the entire will is impeached on the ground that the testator was not of sane mind; and particular devises in it are also impeached on special grounds.

THE will of Lord *Guillamore* being impeached, first on the ground that the testator was not of sound mind at the time of making it; and particular devises in it are also impeached on special grounds.

time when he executed it; and secondly, that certain devises contained in it were inserted by means of undue influence exercised upon the testator; the question was, in what form the issue to try the validity of the will, and of the devises therein, should be framed.

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LORD GUILLAMORE
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Argument.

Mr. Bennett, for the plaintiff, submitted that the proper issue was, whether the paper writing, bearing date, &c., or any and what part thereof, be the last will and testament of *Standish Lord Viscount Guillamore* or not; and cited *Lord Trimlestown v. D'Alton(a)*.

Mr. Radcliffe for the defendant.

THE LORD CHANCELLOR:—

I do not recollect any case in which an issue was directed in the terms proposed. A jury has been asked, whether a particular clause was a part of the will; but not in the form proposed. I think the better way would be, to take the parts of the will which are not disputed on the ground of undue influence, and ask the jury whether the testator made those devises. That will raise the question of sanity. Then take the other parts, which are disputed, and ask, whether he made those devises. I should be afraid to make a precedent by directing the issue in the way asked. On the question of sanity, the devisees must be plaintiffs; and on each particular issue, the devisee of that particular land is to be the plaintiff(b).

Judgment.

(a) 1 Dow. & C. 85. 88.

(b) See the decree in *Hippesley v. Horner*, Seton on Decrees, 349.

1845. The order directed several issues to be tried :—First;
 LORD GUILLA- *Devisavit vel non.* Second; Whether *Standish O' Grady*,
 MORE
 v.
 O'GRADY. Viscount *Guillamore*, deceased, in the pleadings mentioned,
 Order. did in and by a certain writing, bearing date, &c., pur-
 porting to be the last will and testament of the said *Standish*
Viscount Guillamore, devise in manner and form following,
 that is to say :—and then set out a certain portion of the
 will. The other issues were framed in the same manner
 as the second.

Ex Parte BANKS, Public Officer of THE PROVINCIAL BANK OF IRELAND.

In Re CLARKES, Bankrupts.

Feb. 1. 4.

Four partners, and two sureties for them, entered into a joint and several bond to trustees of a banking company, to secure the payment of all such sums of money as, upon the balance of any account current between the partners and the bank, should from time to time be due by the partners, to the extent of 1000*l.* Separate judgments were entered against the obligors.

JOHN CLARKE, *Archibald Clarke*, *Samuel Clarke*, and *Alexander Clarke*, copartners, trading under the firm of *John Clarke and Brothers*, and *Hugh Barkley*, and *George B. Coulter*, executed their joint and several bond, payable immediately, to Sir *Robert Campbell* and *John Pretty Muspratt*, two of the trustees of the Provincial Bank of Ireland, in the penal sum of 2000*l.* The condition of the bond,—after reciting, that the *Clarkes* (naming them) had opened an account with the copartnership called the Provincial Bank, and were desirous of being accommodated by the Bank from time to time in some or other of the various modes in which bankers are in the habit of affording accommodation; and that in order to induce the Bank to take the

The trading firm having become bankrupt :—*Held*, that the banking company might prove against the joint estate for a balance less than 1000*l.*, due on foot of an account current.

said account, and to accommodate them from time to time in some one or other of the modes aforesaid, the obligors (naming them) had respectively agreed to enter into the above bond,—was, that if the *Clarkes* (naming them), or some or one of them, or their or some one of their heirs, executors, or administrators, did and should well and truly pay, or cause to be paid, to the said copartnership, all and every such sum and sums of money as upon the balance of any account current which then was, or at any time or times thereafter should be open between the said *Clarkes* (naming them) and the said copartnership, at any of the establishments of the copartnership, should from time to time be due and owing from or by the said *Clarkes* (naming them), their executors, &c., together with all discount, postage of letters and commission, according to the usage and course of business ; but nevertheless to the extent only of 1000*l.* principal money, exclusive of interest and costs, in case such balance should exceed that sum ; and so that the above bond should be a continuing security to the said copartnership, to the amount of 1000*l.* principal money, besides such interest and costs as aforesaid, notwithstanding any settlement of account, or other matter or thing whatsoever ;—the bond was to be void.

Upon this bond separate judgments were entered up against the obligors.

John Clarke died in June, 1842 ; and in March, 1844, a commission of bankruptcy issued against *Archibald, Samuel, and Alexander Clarke*, under which they were, in April, 1844, found and declared bankrupts.

At the death of *John Clarke*, the firm of *John Clarke*

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and Brothers was indebted to the Provincial Bank in the sum of 871*l.* 19*s.* 10*d.* principal money, on foot of advances made by the Bank to the firm, together with 13*l.* 5*s.* 9*d.* interest thereon: which sum, together with the further interest up to the date of the commission, was due to the Bank by the bankrupts, as the surviving partners of the firm, at the time of their bankruptcy. The bankrupts were also, at the date of the commission, indebted to the Bank in the sum of 77*l.* 0*s.* 6*d.*, being the amount of three several bills of exchange, and interest thereon, which were endorsed to the Bank, by the bankrupts, after the death of *John Clarke*, and discounted by the Bank for the accommodation of the bankrupts in the course of their trade; and which bills were not paid when due. The several demands of the Bank amounted in the whole to 1073*l.* 12*s.* 1*d.*

The proof of debts made by the public officer of the Provincial Bank, stated that the bankrupts were at the date of the commission jointly and severally indebted to the deponent, as such public officer, for and on behalf of the Bank, in the sum of 1073*l.* 12*s.* 1*d.*, being the balance of principal and interest due thereon to the date of the commission, on foot of an account current; that for the sum the deponent had not, nor had any person or person for his behoof, or who were authorized to receive same received any payment, security or satisfaction whatever save and except the securities specified in the schedule to the proof; viz., the joint and several bond of the 21st September, 1840; the several judgments obtained thereon in Michaelmas Term, 1840, against the several obligors and a joint and several promissory note to *Robert Murray* by the said *Hugh Barkley* and *George B. Coulter*, dated

the 23rd of May, 1843, payable the 1st of January, 1844,
1872. 9s. 6d.

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Upon this proof Mr. Commissioner *Maran* adjudged, that the Bank was not entitled to prove for the amount claimed by the deposition against the joint estate of the bankrupts, but only against the separate estate of each of the bankrupts at foot of the separate judgments entered against them respectively. And from the minute of the order of the Court, it appeared that the Commissioner so adjudged upon these grounds: First,—Because it appeared to him, that the Bank, by entering up separate judgments, determined their election, and fixed their *status* at the time of the bankruptcy. Secondly,—Because, even if it were possible to obliterate the separate judgments, and go back to the bond, so as to treat the bankrupts as joint debtors, the claim of the Bank to prove on the joint estate would be encountered by the principle, that there were two other persons alive and solvent, bound jointly with the bankrupts, namely, the co-obligors(a).

The public officer of the Bank thereupon presented his petition to the Lord Chancellor, praying him to declare that the petitioner was entitled to prove against the joint estate of the bankrupts for the sum claimed by him in his deposition; and that the proof so exhibited by him, against the joint estate of the bankrupts, might be received.

Mr. *Moore* and Mr. *Rogers* for the petitioner.

Argument.

The debt did not exist when the bond was executed; and a non-existing debt cannot merge in a collateral secu-

(a) The case in the Bankrupt Court is reported in 7 Ir. Eq. R. 39.

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rity; *Holmes v. Bell*(a). The petitioner is clearly entitled to prove for the 97*l.* advanced by the Bank on the bills of exchange after the death of *John Clarke*; for the condition of the bond does not extend to a liability incurred after the death of one of the partners.

Mr. *Monahan* and Mr. *Creighton* for the assignee.

The attention of the Commissioner was not directed to the fact, that the 97*l.* was a debt incurred after the decease of *John Clarke*. The petitioner is not entitled to prove as a simple contract creditor against the joint estate, because, at the time of the bankruptcy, an action of assumpsit for the balance of the account current could not have been maintained; for the bond was an original, not a collateral security, and the moment an advance was made, it became a specialty debt by virtue of it; *Bulstrode v. Gilburn*(b). The case of *Holmes v. Bell* is distinguishable; for there the bond was payable at a future time, and therefore clearly only a collateral security. Here the bond is payable immediately. The circumstance that other persons joined the bond as sureties does not demonstrate that the bond is merely a collateral security; *Pudsey's case*, cited in *Hooper's case*(c). Here the Bank, having entered separate judgments upon the bond, have elected to treat their demand as a separate and not a joint debt, and cannot fall back on the bond, which has merged in the judgment. *Ex parte Christie*(d).

Mr. *Rogers* in reply. The Bank did not seek to prove their demand under the bond: that distinguishes this case

(a) 3 Scott, N. R. 479.

(b) 2 Str. 1027.

(c) 2 Leon. 210.

(d) 2 Dea. & Ch. 155.

from *Ex parte Christie*. The principle of merger cannot apply to this case; for the bond was executed and the judgment was confessed before any debt was contracted to the Bank: *Ex parte Parnell(a)*.

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Argument.

THE LORD CHANCELLOR :

I should be sorry if that which has been decided by the Court below should turn out to be the law, for it would lead to great inconvenience amongst traders. I will not finally part with this case without looking into the authorities upon the subject, out of respect to the learned Commissioner, who, in the exercise of his duties, has taken so much pains in referring to, and commenting upon the cases before him. It would not be acting with the respect which is due to him, if I decided without further consideration; but I have so strong an opinion upon the subject, that I shall now express it, reserving to myself the power to change it, if I should ultimately agree with him. The facts of the case are these:—There was a partnership consisting of four persons, who proposed to have certain dealings with the Provincial Bank; and they, together with two sureties, entered into a joint and several bond in a penalty of 2000*l.*, to secure the balances which at any time, if they chose to proceed on the bond, should be due to the Bank on any account current, with discount, interest, &c.; but the Bank was not to recover on foot of that security more than 1000*l.*, exclusive of interest and discounts; and it was to be at liberty to recover that sum, though accounts had been settled between the parties, and

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the balances had been paid before the Bank proceeded on the security: and there was a warrant of attorney for entering up judgment upon that bond, in order the better to secure the advances which should be made. Accordingly the Bank entered up six separate judgments against the obligors in the bond; and the traders having become bankrupts, the question is, whether, for the balance of the account as it stood between the Bank and the partnership at the date of the bankruptcy, the Bank is at liberty to prove against the joint estate of the traders as for a simple contract debt. The Bank would certainly be at liberty to do so, unless it can be made out that the bond and the separate judgments thereon constitute the only security,—I should rather say, the only contract,—between those two parties; and thus prevent the Bank from maintaining a joint demand against the traders. I am not aware of any authority which bears directly upon this case; all those which have been cited by the learned Commissioner prove only, what is not disputed, that a bond taken for an existing simple contract debt merges the simple contract debt; and that a bond debt will merge in the judgment entered up upon it. The case of *Ex parte Christie* does not apply to the present, for there the original contract was a joint one, the creditors took a joint separate bond from the debtors, and then entered a joint judgment upon that bond. There was, therefore, a merger of the bond, and there was no other contract to fall back upon than a joint contract. There could, therefore, be no right to prove against the separate estate. The case of *Bulstrode v. Gilburn*, is of a different nature, and does seem to bear somewhat more strongly on this point; but I apprehend that it turned upon

this:—A prothonotary appointed a deputy, and it was arranged between them what the deputy was to have, and he covenanted to account for the rest. The deputy received fees, which were the subject of a dispute between him and the prothonotary, and the latter brought an action for money had and received against the deputy ; and it was held, that, although he was entitled to what he demanded, he was not entitled to recover in assumpsit, because he had taken a covenant to account from the deputy, and therefore his remedy was by an action on the covenant. But that case, in fact, depended wholly on the covenant, whereby it was arranged how much each party was to have. Until the covenant was produced, it could not be ascertained what it was to which the plaintiff was entitled. Therefore he was obliged to resort to that security which constituted his only right to recover from his deputy. But this case is altogether different.

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Judgment.

Put this case, that, ten hours before the bankruptcy, the bankers had advanced 3000*l.* to these four traders. Now the moment after the expiration of the period for which the money was lent (laying aside, for the present, the consideration of the bond and judgment), an action of assumpsit might have been maintained. But then the bond is produced, and it is said that the bankers have lost their remedy as for a simple contract debt, for the amount which the bond would cover. But that is only as to one-third of the sum advanced, for they have not lost their remedy as to two-thirds of it; and therefore, in the case supposed, I should have to sever the contract, and consider it as two contracts; and say, that as to 1000*l.*, the simple contract debt was merged in the bond and judgments, but that as to the remaining 2000*l.*, it remained, as it originally was, a simple contract debt of all the partners. That is ra-

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ther a fanciful proposition. But how does the matter really stand? Upon every fresh transaction between the parties a right of action of assumpsit accrued. Such right was the essence of the transaction. How can that right be affected by a collateral security, such as this is, not covering an antecedent debt, or an ascertained balance, but any balance the creditor chooses, up to the sum of 1000*l*.? Will I say that every transaction is covered by this bond which may not be sufficient to cover the whole of any one given transaction? I am not satisfied that such is the case. But if I hold this to be a continuing security for a fluctuating balance on an uncertain state of account arising at any period of time, what injury do I do to any person; what rule of law do I contravene? I leave the liability exactly as I find it, and I give the bond all the force and efficiency it was intended to have. So far as the party proceeds on the judgments, he must rely on them, and on them alone; but if he proceed on foot of the original liability, that liability is not barred or merged by the bond or judgments. Observe the difficulty in which the learned Commissioner was placed by his judgment. He says that if he were to go back to the bond, it is not the joint obligation of the bankrupts, but of the bankrupts and the other persons who must be presumed to be alive; and the rule is clearly established, that you cannot prove against the bankrupt if the surety be alive and solvent. Does it then show that the original demand is not merged in the judgments; otherwise there could be no objection to the Bank proving against some of the co-obligors. I entertain a strong opinion upon this question, but I will not finally dispose of it without looking into the authorities. In the meantime, if I do not alter my opinion, the order appealed against stands reversed, with liberty to the petitioner to prove against the joint estate.

THE LORD CHANCELLOR :

I have looked into the authorities, and I retain the opinion which I expressed at the hearing, that this is a joint debt, proveable against the joint estate of the bankrupts. The dealing was between four parties and the Bank; and it would appear to have been limited to a joint dealing. The security is not from the four partners alone to the Bank, but from six persons, two of whom were sureties for the other four, the partners; and it is given, not to the banking company, but to two persons as trustees for the company. This, therefore, is a collateral security by six persons to two persons; and the debt is from four persons to the company generally. The security, also, does not cover the debt which may at any given time be due, but only a portion of that debt; neither is it for the debt actually due at any given period, but it is to cover that portion of the debt agreed on, which the party to whom the security is given may at any given moment think fit to enforce on foot of the security. It is a joint debt. What puts an end to all doubt on the subject is, that the condition of the bond is not for any payment to be made by the six to the two, from whom, and to whom the security is given; but it is a bond from the six to the two, conditioned to be void upon payment by the four to the company. They considered, therefore, that the dealings would, as in fact they did, continue with the four jointly with the company; but the security was by the six to the two trustees; it was, therefore, only a further and collateral security.

I may observe that this point was not argued in the Court below. As to the bills of exchange, they were

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CLARKES.

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CLARKES.
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overlooked below. In fact, part of the debt appears to have been covered by bills of exchange. The demand foot of them was not affected by the bond. I am of opinion that the security was collateral; therefore the petitioner must be permitted to prove against the estate for the whole of the debt.

Ex parte YEATES.

In re JOHNSTONS, Minors.

February 7.

Two out of three testamentary guardians declined to accept the trust. They are not entitled, as of right, after the death of their co-guardian, to be appointed guardians by the Court.

But said testamentary guardians (other circumstances being equal) will be preferred to the person nominated in the will of the mother (the third guardian), to be the guardians of the infants after her decease.

The solicitor for any of the persons who exercise a control over the minors' estate, will not be appointed the guardian of their persons.

THIS was an appeal from an order of the Master of the Rolls, whereby he confirmed a report of the Master of the Rolls proving of Messrs. *Graham* and *Collum* to be the guardians of the persons of the minors.

The father of the minors, by his will, appointed Messrs. *Graham* and *Collum* to be guardians of the children. The minors were made wards of Court, by petition presented by their mother, stating that Messrs. *Graham* and *Collum* had declined to act; and that she was willing to act as guardian of their persons; and praying that she might be appointed guardian of their persons, and Master guardian of their fortunes. Upon this petition the Master referred to the Master to inquire, amongst other things, whether any guardians had been appointed by the will of the testator; and if so, whether they, or any of them, were willing to act. The Master reported, that Mr. *Johnston* alone was willing to act as guardian of the persons of the minors, and that Messrs. *Graham* and *Collum* were willing to act as guardians of their fortunes. Mr. *Johnston*, who was a solicitor, acted as the solicitor for Mrs. *J*.

in the matter; and in her name presented a petition to have that report confirmed. The other facts sufficiently appear in the judgment of the *Lord Chancellor*.

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JOHNSTONS.

Statement.

The *Solicitor-General* (Mr. *Greene*), Mr. *Brooke*, and Mr. *Sherlock*, for the petitioners.

Mr. *Moore*, Mr. *Monahan*, and Mr. *Sproule*, for Messrs. *Graham* and *Collum*.

THE LORD CHANCELLOR :

As far as the question depends upon right, the case stands thus : the father of the minors, having by law the power to appoint a testamentary guardian, exercised that power by his will, and appointed his widow, Mr. *Graham*, and Mr. *Collum*, joint guardians; and the children being very young at the time of his death, the two gentlemen withdrew themselves from the guardianship, and left the entire management of the minors to the widow. A petition was presented by her, and the children were made wards of Court. The property, therefore, came under the direction of the Court itself; but that would not have deprived the testamentary guardians (who have both a power and a trust) of their control over the property and persons of the minors, if they had not themselves, in effect, relinquished the trust. The usual reference was made to the Master; and the widow was appointed sole guardian of the persons, and the Master was appointed guardian of the fortunes. Thus matters remained until the death of Mrs. *Johnston*. Some time before her decease she was desirous that another person should be appointed co-guardian with herself. It appears that at first she was willing that the children

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should be placed with a clergyman of the Church of England, a maternal relative of their's, and that he should have the care of them, if the event of her illness required it; but she afterwards changed her mind, and became dissatisfied with her own relations, and desired that a relative of her husband should be joined with her in the guardianship; and accordingly she presented a petition, praying that Mr. *Johnston*, the paternal uncle of the minors, might be appointed co-guardian with her. Upon that petition being presented, Mr. *Graham* and Mr. *Colman*, who had in effect renounced the guardianship, presented a counter-petition, praying in effect that they might be permitted to resume their powers as testamentary guardians, along with her. Upon that petition coming before me, - I struck out so much of it as prayed to that effect; but I sent it to the Master to inquire who were fit and proper persons to be appointed guardians, having regard to the direction in the will of the father. That shows, that although I thought the Master ought to have regard to that direction, I did not consider that, after their acts, the testamentary guardians had a right to be appointed.

Soon after, Mrs. *Johnston* died, and then the matter came to be contested between the present litigants; and the Master, upon the whole view of the case, has appointed the two testamentary guardians to be the guardians of the persons of the minors. The persons who opposed them had certainly a strong claim; for, by the will of the mother, they were named as the persons to whose care she wished the children to be confided; and, so far as lay in her power, she appointed them guardians of their persons. But she had, by law, no power to appoint testamentary guardians. The husband had the power, and exercised it; the wife had not the power, but attempted to exercise it. Her will was

a nullity in this respect, except so far as the Court would look at it as a strong expression of her confidence in the persons to whom she desired that the guardianship of her children should be confided. Upon the question of right, therefore, supposing that Messrs. *Graham* and *Collum* had not relinquished their office, there could be no contest, for the right would be in them: but I am of opinion that, considering all the acts which have taken place, the testamentary guardians have relinquished their trust; and, therefore, this becomes a case in which neither party has an actual right; and then it depends entirely upon what is expedient, and upon the discretion of the Court; but that discretion is to be ruled and governed by the law of the Court. I shall therefore, in this case, have regard to the fact of the appointment by the father, who had the power to do so, and to the very strong desire expressed by the mother: but if I must set the one against the other, I must give the greater weight (the circumstances remaining the same) to the desire of the parent who had the power to appoint. In determining which of the applicants it is most expedient to appoint, I am only to consider what will be for the benefit of the minors. It is a constant practice of the Court, and a wise one, not, upon light grounds, to interfere with the decision of the Master in questions merely of discretion, as in the appointment of receivers and guardians: and if such be the rule in ordinary cases, it must apply much more forcibly to the present case, in which the decision of the Master has been confirmed by the Master of the Rolls. Then how does this matter stand in reference to the interest of the minors, putting aside, for an instant, the questions upon the character and conduct of Mr. *Collum*. I have not heard any thing which in the slightest degree impeaches the character of Mr. *Graham*, or the moral character of Mr. *Collum*. With respect to the latter,

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the objections are purely as to acts which he has done in his character of solicitor. I see no reason why, independently of the other circumstances to which I do not now advert, the persons appointed by the father should not resume the situation he meant to confer on them. If I affirm the Master's report, I shall place persons who have not changed their character, in the precise position in which the father meant to place them during the life of his widow: and, if he meant them to act in that character during her life, much more did he intend that they should act after her decease. I only give effect to what would have taken place if these gentlemen had not given up their office. The other applicants have not a superior claim: they have been selected by the mother, who could only recommend their appointment; but I cannot place her recommendation above the appointment of her husband.

Looking at the other circumstances, I think the advantages are in favour of the appointment of the husband's nominees. It is said that they will not personally superintend the education of the children; no objection has been raised against Mr. *Devereux*, with whom it is proposed the children should be placed, and who is their near relative: nothing can be more advantageous than that the children should be placed under his care. As to the persons with whom the mother wished them to be placed, one of them is a young man, a member of the bar, who has therefore, to follow his profession, and is not a person likely to look after young children. It is proposed that the care of the minors should devolve on the other, a lady, who has a large family of her own. I do not think that a recommendation, or that she is so likely to educate the minors properly as Mr. *Devereux*. It was then objected that Mr. *Collum* has acted as solicitor for the receiver, who is his

father; for the committee of the estate, the Master; for the minors themselves, in the minor matter; and for the trustees in the settlement; and that thereby considerable costs have been incurred,—I do not say improperly,—and that he now proposes to become the guardian of the persons of the minors: and that, if his application be granted, he will have power over every person (*Mr. Graham* being his client) who would, in any manner, have control over the estate. This having been brought under the consideration of the Master, *Mr. Collum* retired, of his own accord, from being solicitor for the minors, and is now willing to retire from being solicitor for the receiver. It is said that he has appointed an attorney of his own nomination to be solicitor for the receiver. I give him full credit for the statement that he now comes forward simply for the benefit of the minors, and from friendship to the late *Mr. Johnston*; that he promised him to act as his trustee; and that, although he retired when his services were not wanted, he felt bound to come forward when they appeared to be wanted. But no man can serve two masters; and I cannot confirm his appointment, or permit him to act as guardian, unless he will relinquish all interest he may have in this matter as a solicitor. Therefore, without intending any reflexion on his character, he must, for the sake of the jurisdiction of the Court and the propriety of its proceedings, relinquish his office of solicitor to every person who has any control over the property. And I must direct the Master, having regard to the rule respecting the appointment of guardians and receivers, to take care that any solicitor who shall be appointed in his stead, shall not be under any obligation or agreement to give him any share of the profits; and he must not accept of such. I wish it to be understood that, in making this order, it is not my intention, in any manner,

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to reflect upon the conduct of Mr. *Collum*. With that alteration, I shall affirm the order of the Master of the Rolls.

I cannot give the applicants their costs, there having been already two decisions against them. But as they have come here to effectuate the wishes of Mrs. *Johnston*, I shall not make them pay the costs of the other side, which, according to the usual practice in such cases, must come out of the minors' estate.

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Feb. 8. 10.

A decree for the delivery of the possession of lands and title deeds, and payment of money, was made, with costs to be paid by the defendants. One of them, having performed all that he was directed by the decree to do, except paying the costs, died before the costs were taxed:—

Held, that there could be no revivor for the costs.

The general rule is, that there can be no revivor for

untaxed costs; and whether the abatement is caused by the death of the party to pay, or the party to receive the costs, is immaterial.

Morgan v. Scudamore, 2 Ves. Jun. 313; 3 Ves. 195; and *Barry v. Stawell*, Flan. & Kel. 1, observed upon.

THE bill stated, that in December, 1833, *Joseph Ruston* and *Frances*, his wife, since deceased, exhibited their original bill of complaint in this Court, against *Elizabeth Blair*, *John Beamish*, and others, praying that the will of *Charles Frederick Abbott* might be established; and that the plaintiffs might be declared entitled, in right of the plaintiff *Frances*, to an equitable estate in fee simple in the lands therein mentioned; and for relief consequent thereto. That, before any decree in that suit, *Joseph Ruston* and *Frances*, his wife, both died; that the latter survived her husband; and by her will devised the estate, the subject matter of the suit, to *Frederick Bowyer*, and his heirs, upon certain trusts therein mentioned; and appointed *George Emery* her executor, who proved her will. That

January, 1838, *Frederick Bowyer, George Emery*, and her persons claiming under the will of *Frances Rushton* were also the plaintiffs in the present suit, exhibited original bill, in the nature of a bill of revivor, against defendants to the original suit, praying the same relief prayed by the original bill. That the defendants admitted, and answered that bill; and an issue having been directed to try the validity of the will of *Charles F. Abbott*, and a case having been sent to the Court of King's Bench respecting the construction thereof, it was, on the 7th of May, 1840, declared, that the will of *Charles F. Abbott* was well proved, and that the plaintiff, *F. Bowyer*, as devisee in trust named in the will of *Frances Rushton*, was entitled to an estate in fee simple in the lands comprised in the will of *Charles F. Abbott*; and that the defendant, *J. R. Barry*, should execute a conveyance of the legal fee and inheritance in the lands to *Frederick Bowyer*, to hold on the trusts of the will of *Frances Rushton*. And it was further decreed, that the defendants should deliver to the plaintiff, *Frederick Bowyer*, the several title-deeds, tenants' leases, and other documents and muniments of title relating to the said lands and premises; and that an injunction should issue to restrain the plaintiff, *F. Bowyer*, from entering into possession of such parts of the lands as the defendants, or any of them, were or should be in the actual occupation of, and into receipt of the rents and profits of such parts thereof as were in the occu-

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In fact, the issue *devisavit* was tried three times. On the first occasion, the jury found in favour of the will; on the second, they discharged without giving a verdict; on the third, they found in favour of the plaintiff. The two first trials took place in the lifetime of *Joseph Rushton* and *Frances*, his wife: in the third, which took place after their decease, *Frederick Bowyer* was the plaintiff.

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pation of persons not parties to the cause. And it was referred to the Master, to take an account of the rents and profits of the lands received by the defendants, *H. Heazle R. Tresilian, T. Oldham, T. Bennett, and John Beamish* respectively; or which, without their wilful default, they might respectively have received, from the 17th of December, 1827, to the appointment of the receiver in the cause. And it was further ordered, that the several parties, plaintiffs and defendants respectively, should abide their own costs of the trials of the several issues, which were directed by the order made in the cause in which *Rushton* and wife were plaintiffs: and that the said defendants should be at liberty to set off the costs of the ejectment in the pleading mentioned against any costs thereafter directed to be paid by them to the plaintiffs; but without prejudice to their attorney's lien, if any, thereon: and that the said defendants (naming those last above-named), should pay to the plaintiffs the costs of the trial of the issue, directed by the order made in the cause wherein the present plaintiffs were plaintiffs, bearing date the 28th of January, 1839, when taxed and ascertained: and that all parties should abide their own costs of the case sent to the Queen's Bench. And it was declared, that the plaintiffs were entitled to their costs, in the cause instituted by them as aforesaid; and that the plaintiff, *George Emery*, as executor of *Frances Rushton*, was entitled to the costs incurred in the cause in which *Rushton* and wife were plaintiffs. And it was decreed, that the said costs so thereby decreed to the plaintiffs jointly, and to the plaintiff, *George Emery*, as executor, should be paid by the defendants, *H. Heazle, R. Tresilian, J. Oldham, T. Bennett, and John Beamish* and that *J. R. Barry* should have his costs in the original and revived suit against the plaintiffs; and the

the plaintiffs should have them over against the said defendants.

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The bill further set forth that the Master made his report under that decree; and that on the 16th of June, 1841, a decree was made on report and merits, whereby it was ordered, that the several above-named defendants should respectively pay the sums therein mentioned, for mesne rates; and, *inter alia*, that the defendant, *John Beamish*, should pay to the plaintiff, *Frederick Bowyer*, as such trustee as aforesaid, the sum of 479*l.* 1*s.* 5*d.*, being the sum reported due by him, the said *John Beamish*, as and for mesne rates. And it was further ordered, that the defendants, *H. Heazle*, *R. Tresilian*, *T. Bennett*, *T. Oldham*, and *John Beamish*, should respectively pay to the plaintiffs the costs incurred in the cause since the pronouncing of the decree of the 7th of May, 1840, including the costs of the hearing, in proportion to the sums payable by them respectively for mesne rates as aforesaid.

The bill further stated, that after the pronouncing of the last-mentioned decree, the defendant, *John Beamish*, died; and that administration, with his will annexed, was granted to *Francis Beamish*. That, by the death of *John Beamish*, the suit became abated; and that plaintiffs were entitled to have it revived against *Francis Beamish*, as the personal representative of *John Beamish*. And the bill prayed, that it might be revived accordingly; and that *Francis Beamish* might either admit assets of *John Beamish*, or that an account of them might be taken.

To this bill *Francis Beamish* pleaded, that after the

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making of the decree of May, 1840, and before the filing of the present bill, *John Beamish* delivered to the complainants all title-deeds, tenants' leases, and other documents and muniments of title relating to said lands and premises in the decree mentioned, and which were in his possession, power or procurement: and that, in pursuance of the decree, and in the life-time of *John Beamish*, an injunction issued; and that, by virtue thereof, the plaintiffs were put into possession according to the directions in the decree: and that *John Beamish*, in his life-time, after the making of the decree of June, 1841, and before the filing of the present bill, viz., on the 30th July, 1841, duly paid and satisfied unto the plaintiff, *Frederick Bowyer*, the sum of 479*l.* 1*s.* 5*d.*, by the said decree ordered to be paid by him for mesne rates, with all interest due thereon; and executed and performed the said decree in all things on his part to be performed, save as respected the costs thereby ordered to be paid by said *John Beamish*. And he averred that said sum of 479*l.* 1*s.* 5*d.*, with the said interest thereon amounting in the whole to the sum of 479*l.* 17*s.* 6*d.*, was then taken and accepted by the plaintiff, *Frederick Bowyer* in full payment and satisfaction of the mesne rates decreed to be paid by *John Beamish*: and that the said costs, or any of them, or any part thereof, were not taxed or ascertained in the life-time of *John Beamish*.

THE MASTER OF THE ROLLS allowed the plea(a); and the plaintiffs now appealed from his decision.

Argument.

Mr. *Pigot* and Mr. *Deasy* for the plaintiffs.

There are two grounds on which the plaintiffs are entitled

(a) 7 Ir. Eq. R. 7.

to maintain this bill : (1). That whenever a decree is for other purposes than the mere payment of costs, the plaintiff is entitled to revive for the costs, though they have not been taxed in the life-time of the party chargeable with them. (2). Upon the circumstances of this case ; viz. : that there were matters to be done by the defendant under the decree, besides the payment of costs ; and therefore this is not a mere revival for costs.

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This case is the converse of *Morgan v. Scudamore*(a) ; but the principles laid down in that case apply to the present. This case is directly within the authority of *Price v. Humphrey*(b), referred to by Lord Loughborough in *Morgan v. Scudamore*. The principle established by *Price v. Humphrey* is, that whenever, coupled with the direction to pay costs, there is a decree for a duty to be performed, the plaintiff may revive for the costs, though the duty has been performed and the costs have not been taxed in the life-time of the party to pay them. *Jupp v. Geering*(c) is not an authority the other way ; for in that case no duty was decreed to be performed. The costs there in question were the costs of dismissing the plaintiff's bill. So it will be found that all the cases in which the right to revive for costs was denied, were cases of bills dismissed with costs. In *Morgan v. Scudamore* it was held that there might be a revivor for untaxed costs after the death of the party to receive them ; and no distinction in principle can be pointed out between the death of the party to receive and that of the party to pay. To deny the right in the latter case, because it may be necessary to take an account of the assets

(a) 2 Ves. Jun. 313 ; 3 Ves. 195. (c) 5 Mad. 375.

(b) 3 Ves. 197 ; S. C. 1 Dick. 381.

1845. of the deceased, is inconsistent with the first principles
 justice. In *Barry v. Stawell*(a), Sir *M. O'Loughlen*, Ma-
 ter of the Rolls, was of opinion that the principle to be
 deduced from the cases, especially *Morgan v. Scudamor*
 and *Kemp v. Mackrell*(b), was, that there was no distinction
 between an abatement before and after taxation; and
 that in either case there might be a revivor for costs by
 against the personal representative. The decision in the
 case was affirmed on appeal(c).

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There are matters which remain to be executed under
 this decree, with some of which the defendant is connected.
 The costs of the ejectment are to be set off against the costs
 to be paid by the defendants. That induces the necessity
 of instituting inquiries as to the amount of those costs, by
 whom they have been incurred, and whether anything has
 been paid on foot of them, and to whom. So also the liability
 of each defendant to the costs given by the second
 decree, is to be in proportion to the sum decreed to be paid
 by him for mesne rates. There must, therefore, be further
 proceedings under the decree, before the liability of the de-
 fendants can be ascertained.

The 3 & 4 Vict. c. 105, s. 27, gives to decrees and orders
 of a Court of Equity, whereby any sum of money or costs
 is ordered to be paid, the effect of a judgment at law; and
 though the costs are not ascertained at the time of the de-
 cree, yet the decree gives a present right to them, which
 may afterwards be made effectual; *Jones v. Williams*(d).

(a) Fl. & Kel. 1; S. C. 3 Ir. Eq. R. 18.
 (c) 3 Ir. Eq. R. 146.
 (d) 8 M. & W. 358.
 (b) 2 Ves. 579; S. C. 3 Atk. 812.

The *Solicitor-General*, Mr. W. Brooke, and Mr. Cro-
min, for the defendant.

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The proposition contended for is opposed to the long-established rule of the Court. The general rule is, that if the party die before taxation, there can be no revivor in respect of costs only *against* his personal representative(a). That rule has never been departed from.

In *Morgan v. Scudamore* a distinction was taken between the death of the party to pay and the death of the party to receive ; but that distinction was denied by Sir J. Leach, in *Jupp v. Geering*. The decision in *Barry v. Stawell* proceeded on the ground that there was a duty imposed on the plaintiffs by the decree to pay the costs to the defendant who had died ; and the Master of the Rolls said, in *Hutchins v. Hutchins*(b), that he had stretched the jurisdiction as far as he could in *Barry v. Stawell*, to meet the justice of the case. He recognised the authority of *Jupp v. Geering*, as did also Lord Plunket, in *Betagh v. Concannon*(c).

The plea avers that every thing decreed to be performed by John Beamish had been done, save the payment of the costs ; and the plaintiffs, by setting down the plea for argument, have admitted that statement to be true. The set-off of the costs of the ejectment is a matter for the benefit of the defendant : and there is no question of contribution in the case ; the amount of the costs payable by each defendant is a simple matter of calculation.

(a) Beames on Costs, ed. 1840, (b) 3 Ir. Eq. R. 217.

p. 131 ; and the cases cited in the (c) Ll. & G. temp. Plunk. 355.
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The 3 & 4 Vict. c. 105, though it gives to decrees of the Court the efficacy of judgments, does not alter the rule of equity.

Judgment. THE LORD CHANCELLOR :—

The order complained of is impeached on two distinct grounds: First, that it is against the rule of the Court generally; Secondly, that the peculiar circumstances of the case take it out of the operation of the general rule. Every Judge of a Court of Equity, who has been compelled to adjudicate upon this rule, has deplored its existence; but nevertheless, it exists, and must be obeyed: and although various exceptions to the rule have been established, which I shall always readily follow, yet I must take care not to fritter away the rule altogether.

As to the rule itself, it is said that there is a distinction established by the cases, between the death of the party who was to receive, and the death of the party who was to pay the costs. I, however, am clearly of opinion, that there is no such distinction; and that *Morgan v. Scudamore*(a) cannot be sustained upon that ground; nor do I consider that to be the distinction upon which Lord Rosslyn decided that case. Lord Hardwicke, in *White v. Hayward*(b), expressly lays it down, that the rule applies equally to the case of the plaintiff or defendant dying; and in another case, *Kemp v. Mackerell*(c), he states that the death of the party to receive does not alter the rule. The first case

(a) 2 Ves. Jun. 313; 3 Ves. 195. (c) 2 Ves. 580; S. C. 3 Atk. 81

(b) 2 Ves. 461.

White v. Hayward, was wholly taken out of the rule ; for there the costs had been taxed, and the party was in contempt for not paying them ; and the only question was, whether the Court would discharge him unless the other party revived the suit. It is only necessary to refer to that case to show that Lord *Hardwicke* did not intend to break in upon the rule. The other case, *Kemp v. Mackrell*, was a decision upon an exception to the rule. The defendant was to have his costs out of the fund ; he filed a cross bill, which was dismissed with costs ; and upon his death it was insisted that the costs of the dismissal were not to be paid out of his assets : but Lord *Hardwicke* said he considered the cross bill was a defence ; and as they came to the Court to have the costs of the original bill paid out of the fund, there ought to be a set-off as to the costs of the cross bill. No fault can be found with that decision. Down to that period, therefore, the exceptions are fully admitted, and I do not observe that there was any impeachment of this rule. Then came the case of *Morgan v. Scudamore*, in which the bill was filed to set aside certain deeds for fraud, and there was a decree for the plaintiff, with costs. The deeds had not been delivered up to be cancelled ; but the costs had been ascertained, though the Master's certificate had not been granted, and then the party who had to receive the costs died ; and Lord *Rosslyn* in that case, which was before him upon two occasions, upon demurrer and at the hearing, decided that the costs were not lost. In effect he held that a bill of revivor might be filed for them ; and he placed some reliance upon the fact, that the costs had been taxed ; but he decided the case upon the ground that the deeds were set aside for fraud. He referred to a case, *Price v. Humphrey*, before Lord *Camden*, in which the bill was to set aside deeds for fraud ; which was decreed with costs.

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The plaintiff died before the costs were taxed. A bill of revivor having been filed for the costs alone, a demurrer was put in ; which was overruled by the Chancellor, on the ground that the deeds had been set aside for fraud : and Lord *Eldon* followed that authority, saying, that it was duty which ought to be discharged by the defendant. From these decisions I collect that where deeds are set aside for fraud, with costs, the costs form a part of the actual relief granted ; that the decree is wholly for relief ; not, in a sense partly for costs, or separable into matter of relief and costs. Whether that is a proper distinction I am not now to consider ; but that, I conceive, is the ground upon which *Morgan v. Scudamore* was decided. In *Jupp v. Geering*(a), Sir John Leach considered *Morgan v. Scudamore* not to be an authority against the general rule ; nor was it. The case before him was the naked case of a bill being dismissed with costs. The marginal note in that case is erroneous ; for it was the defendant who died, not the plaintiff ; and it was held that there could not be a revival for costs in that case. I think that decision is right. In *Averall v. Wade*(b), before Sir William M^r Mahon, the bill had been dismissed against one of the defendants, with costs ; he died before the costs were taxed, and the Master of the Rolls held that there could be no revivor. It is reported that he subsequently said that there was a failure of justice in that case.

In *Betagh v. Concannon*(c), Lord Plunket agreed with Sir John Leach in *Jupp v. Geering*, and dissented from Lord Rosslyn's opinion in *Morgan v. Scudamore*, in many words ; and he decided the case upon a distinction

(a) 5 Mad. 375.

(b) 1 Mol. 571, n.

(c) Ll. & G. temp. Plunk. 35

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with which I do not find fault ; for the costs were directed to be paid by the receiver, and it would be difficult to say that the case was not within the principle of the exception, where the costs are ordered to be paid out of a fund : for the receiver represents the estate. It was a direction to pay the costs out of the fund coming to the hands of the receiver. If the decision in that case is not to be supported upon that ground, Lord *Plunket's* confirmation of the rule, as laid down by Sir *John Leach*, would impeach his own decision in *Betagh v. Concannon*. Then came the case of *Barry v. Stawell*(a), which has been much relied on : and no doubt, in that case both the Master of the Rolls and the Lord Chancellor found fault with the decision of *Averall v. Wade*, which was only distinguishable from *Jupp v. Geering* in that it was the case of a sole defendant ; whereas *Averall v. Wade* was the case of the bill being dismissed against one of several defendants. Is that a solid distinction ? When a bill is dismissed as against one of several defendants, with costs, the cause is out of Court as to him. The defendant who has had the bill so dismissed against him has no longer any relation to the other parties. I cannot, therefore, see the distinction between that case and the case before Sir *John Leach* ; I cannot distinguish the cases of the bill being dismissed as against a sole defendant, and of its being dismissed as against one of several defendants. If, therefore, *Averall v. Wade* be not rightly decided, *Jupp v. Geering* must be wrong ; but the same Judge who denied the one, admitted the other. I have a great respect for the learned Judge who decided *Barry v. Stawell* ; but I think *Averall v. Wade* was rightly decided, and that it is not distinguishable from *Jupp v. Geering*. In *Barry v. Stawell*,

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(a) Fl. & K. 1 ; affirmed 3 Ir. Eq. R. 146.

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the bill was dismissed against one defendant with costs and the plaintiff was not to have those costs over against the fund. That raised the naked question ; for, as the plaintiff was not to have those costs over against the fund, it plain that the defendant had no relation to the cause, and that he had been improperly brought before the Court. Entertaining these opinions, I cannot maintain the decision in *Barry v. Stawell*, or bring it within any of the established exceptions to the rule ; particularly as *Morgan v. Scudamore* can only be maintained on the ground that payment of the costs was a duty remaining to be performed ; that is, that the decree having been made on the ground of fraud, the costs were part of the substantive relief. Unless *Barry v. Stawell* can be maintained on the distinction taken by the Master of the Rolls, that the suit was not determined, but was prosecuted by the plaintiff, against whom the costs were awarded, for the purpose of obtaining the relief given to him by the same decree, I think it cannot be maintained at all ; and my own impression is, that it is contrary to the authorities : and on a subsequent occasion, the Master of the Rolls, in *Hutchins v. Hutchins*(a) said that in *Barry v. Stawell* he had stretched the law to the utmost. I am, now, however, to consider what the rule really is ; and I am clearly of opinion that the rule, as it at present stands, bars the right to revive for costs in this case, unless it can be distinguished upon its peculiar circumstances.

This brings me to the consideration of the second point viz., that the defendant was directed by the decree to perform certain acts. Now the plea avers that he has per-

(a) 3 Ir. Eq. R. 217.

formed all those acts, except the payment of costs ; and as issue has not been taken upon the plea, I must assume that those acts have been performed. But then it is said that there is a direction in the decree, that, as against the costs decreed to be paid by the defendants, they are to be at liberty to set off certain other costs incurred in an ejectment. Can that vary the case? That is only a benefit given to the defendants, as against the obligation imposed on them by the decree ; it is not an independent right given to the plaintiffs. The defendants cannot get those costs without paying costs ; but, being liable to costs, they may relieve themselves of that liability to a certain extent. But if that liability has ceased, they have no right to resort to the set-off. It is a benefit which they lose ; not a right which they are to establish. It is said that the costs are given by the decree on further directions, in such a way as involves a question of contribution amongst the defendants. But that is not so. It was decreed that the costs of the suit, up to the decree of 1840, were to be paid by the defendants generally, and that the subsequent costs should be paid by them in certain proportions. That does not involve, properly speaking, a question of contribution. It is not that they are to contribute in common to the payment of the costs, but rather a division of their liabilities. There is a direction defining what each is to pay, and nothing more. Each is to pay in proportion to the sum to which he is liable for mesne rates : but there is no direction that, if any one of the defendants pays more than his share, the others shall contribute. The first decree is general, that the costs shall be paid by all the defendants ; the second decree is, that the subsequent costs shall be paid rateably, in certain proportions. The payment of the costs is not mixed up with any duty to be performed. There are, there-

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fore, no special circumstances in the case; and, consequently, the general rule must prevail. The late Statute does not alter the case. If the plaintiffs have any right under that Statute, let them proceed under it. The existence of such a right would rather be an argument against the rule now. If it exist, it does not alter the rule of this Court. I must, therefore, affirm the decision of the Master of the Rolls, but without costs. The deposit is to be returned

HOGAN v. M'NAMARA.

February 11.

A party unnecessarily serving notices in a cause, shall pay the costs occasioned thereby.

UPON the hearing of this cause, counsel for the plaintiff proceeded to read some notices which passed between the plaintiff and defendant, with a view to affect the question of the costs of the cause.

The LORD CHANCELLOR expressed his disapprobation of the practice of serving notices; and said that, except in cases where it was absolutely necessary to do so, he would visit the party serving them, with all the costs occasioned thereby to any of the parties.

Mr. *W. Brooke*, for the plaintiff, mentioned a case before Sir *Anthony Hart*, in which he referred it to the Master to inquire whether any offers of compromise had been made by the defendant; and made the costs of the suit depend on the result of that inquiry^(a).

Mr. *Fitzgerald*, for the plaintiff, said, that Lord *Plunkett*

(a) See *Armstrong v. Blake*, 1 Mol. 178.

frequently decided the costs of a cause upon the notices which passed between the parties, and that in consequence a practice had sprung up of serving notices : and added that, in the present case, the defendants had not been put to any expense by the notices which had been served.

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The LORD CHANCELLOR said that he never would attend to such notices ; and ordered that the plaintiff should abide his own costs of the notices which had been served.

The bill was afterwards dismissed, with costs.

FRENCH, *Petitioner.*

February 12.

THE petition in this matter was presented by the representative of a lessee for lives renewable for ever, alleging that the persons bound to renew were resident out of the jurisdiction of the Court, and praying for a reference to inquire whether that was the fact ; and if so, that the Master should ascertain the amount due for rent and renewal fines ; and that, upon payment of the same, such person as might be appointed by the Court, should accept a surrender of the old lease, and execute a new lease to the petitioner.

The Court will not make an order on a petition presented under a Act of Parliament, unless it be entitled in the matter of the proper Act.

The petition was entitled in the matter of the Act of the 1 Will. IV. c. 47. By the twenty-second section of that Statute, the 11 Anne, c. 3, was re-enacted as to lands in Ireland ; but the 11 Anne, c. 3, and the 1 Will. IV. c. 47, s. 22, were repealed by the 5 & 6 Will. IV. c. 17(a) ; and

(a) *Vide Prieaux v. M'Kesay*, 5 Law Rec. N. S. 167.

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the Act under which the Court had jurisdiction to make an order on the petition was the 1 & 2 Vict. c. 62.

Judgment.

THE LORD CHANCELLOR :—

The petition is not entitled in the matter of the Act under which I have jurisdiction. I am aware that the Court of Exchequer has held, that a mistake in the title of the Act is not material(*a*) ; but I shall not follow that decision. I shall expect every petition to refer to the proper Act of Parliament. The practice is getting into a very loose state ; the wrong Act of Parliament is constantly referred to, which occasions much loss of time. In the present case, I will give leave to amend the petition, and when amended, I will make an order on it(*b*).

(*a*) *Hunter v. Edmonds*, 6 Ir. Eq. R. 123.

(*b*) *Vide In re Law*, 4 Beav. 509.

In re COSTELLO'S, *Minors*.

Ex parte DILLON.

Feb. 13, 14.

The Master may, in the exercise of a sound discretion, refuse to declare the highest bidder to be tenant of lands set up to be let under the Court: but where the Master did not declare the highest bidder to be the tenant, the Court, upon the application of the bidder, reviewed the circumstances of the case, and declared him to be tenant at the rent offered by him.

MR. MONAHAN, for Dr. Dillon, a third person, moved, by way of appeal from the order of the Master of the Rolls, that the letting of the house and lands had in this matter, under an order to let same for seven years pending the minority, be set aside; and that Dr. Dillon be declared the tenant, at the rent of 175*l.* per annum.

The house and lands were set up to be let subject to several conditions ; one of which was, that the lands, which contained about 180 acres, should be occupied as a grazing farm ; and that no more than twenty acres should at any one time be broken up for tillage for the use of the tenant. A sum of 160*l.* had lately been expended in repairing the dwelling-house. At the letting, Mr. *O'Grady*, who resided about ten miles from the lands, bid 140*l.* ; a person who was objectionable as a tenant bid 170*l.* ; and Dr. *Dillon* bid 175*l.* The receiver objected to Dr. *Dillon* as a tenant for the reasons mentioned in the judgment of the Lord Chancellor ; and the Master having been informed by the receiver that the value of the lands was 160*l.* per annum, and Mr. *O'Grady* having consented to pay that rent, the Master yielded to the objection of the receiver, and declared Mr. *O'Grady* tenant, at the rent of 160*l.*

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COSTELLO'S.

Statement.

It was stated that the Master of the Rolls made no rule on Dr. *Dillon's* application, on the ground that he had no *locus standi* in Court, as there was no contract with any person until his bidding was accepted.

Mr. *Monahan* and Mr. *Dillon*, for Dr. *Dillon*, said, that where lands were set up to be let in the office, there was an implied undertaking by the Court to accept the highest *bonâ fide* bidder, unless a valid objection should be made to him.

Mr. *Moore* and Mr. *Baker* for Mr. *O'Grady*.

Mr. *Millar* for the receiver.

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COSTELLO'S.
—
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THE LORD CHANCELLOR :—

This is a distressing case, for some person must suffer. This property consists of a house and 180 acres of pasture land, in rather an indifferent condition ; and one of the conditions of the letting was, that not more than twenty acres should be broken up in tillage for the use of the house. In other respects the letting was an ordinary one ; and, of course, unless a proper objection to him should be sustained, the highest bidder was to be the tenant.

In considering this case, I must keep in mind two things :—the interest of the minors ; and the effect of the decision upon the general interests of the suitors of the Court. Nothing could be more injurious than that the rule, that the highest bidder should be the purchaser, except there were some proper objection to him, should not be acted upon. I agree that in cases of this nature it would be very unwise, without an absolute necessity, to interfere with the discretion of the Master ; and further, that the Master is not called upon, especially in the case of a letting, to select the highest bidder ; and this case is an example of the propriety of that rule, for it appears that here there was a person, who was objectionable as a tenant, and who would not have bid to any amount, in order to obtain possession of this property : therefore it is right that the Master should have a discretion in the matter ; but it must be a sound discretion, regulated by the general rule of the Court, that, unless there be a sufficient objection to him, the highest bidder is to be the tenant.

The biddings here assume a singular character :

objectionable person above alluded to bid 170*l.*; Dr. *Dillon* bid 175*l.*, and Mr. *O'Grady* bid only 140*l.* It was, therefore, of course to declare Dr. *Dillon* the tenant, unless there were some such ground as insolvency, or some other disqualification, to be objected to him: or unless the nature of the property were such that he, a member of the medical profession, would be an improper tenant for it. If such were the case, the public ought to have been informed that a tenant of a particular description would be required; but in fact it does not appear that there is any thing in the nature of the property which would render Dr. *Dillon* an improper tenant for it.

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Now, the first thing to be observed is, that the condition as to the mode of farming the lands shows that the lands were to be let to a person who was to reside in the house: for it provided that no more than twenty acres should be broken up for the use of the house, that is, for the benefit of the family residing in the house. It appears that Mr. *O'Grady* resides ten miles distant, and has no intention of residing at the house; but, on the other hand, Dr. *Dillon* states his willingness to reside in the house. I think that was a condition intended to be imposed upon the tenant. The Court would not have repaired the house at so considerable an expense, if it were aware that it was to be let to a person who would not reside in it. I therefore think that the circumstance whether the bidder would reside in the house or not, was a material ingredient in the selection of the tenant.

But the more material question is, what was the real ground on account of which Dr. *Dillon* was rejected. It appears that Mr. *Daniel*, the former receiver, having taken

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a lease of this farm in the name of a trustee, was removed from his office, and the letting to his trustee was set aside and it was suspected that *Daniel* would again attempt to obtain possession of the property. This was properly guarded against; and accordingly Mr. *O'Grady* was asked whether he was bidding for *Daniel*, which he denied. It was not necessary to ask Mr. *Galway* that question, for I had previously informed the receiver that he was bidding for Dr. *Dillon*. Then, the biddings being as I have mentioned, the receiver informed the Master that he did not list Dr. *Dillon* as a tenant, because a relative of his had made an affidavit on behalf of the former receiver, when his conduct was under the consideration of the Court; and then while the matter was pending, *Daniel*, the receiver, resided at the house of a sister of Dr. *Dillon's*, in which house Dr. *Dillon* himself sometimes resided. Is that a ground upon which any person ought to act? Is a gentleman whose character, solvency and competency to manage an estate is not disputed, and who has bid 35*l.* more than another, to be rejected, merely because a relative of his has taken a part adverse to the minors in a dispute between them and the former receiver? Dr. *Dillon* swears that he never was connected with the late receiver; I must, therefore, consider him a *bonâ fide* bidder, and deal with him as such. Then am I at liberty to reject his bidding, which was the highest? This is not a case in which the competition is between a bidding of 160*l.*, the sum which Mr. *O'Grady* now agrees to give, and 175*l.*; but it is between a bidding of 140*l.*, the sum actually offered, and 175*l.* The Court naturally feels a prejudice in favour of a person who bids 35*l.* more than another man, who, upon his own admission, for so I must take his acts, bids 20*l.* under the value of it; and nothing could be more injurious than to

ject the highest bidder under such circumstances. I wholly disclaim the intention of interfering with the sound discretion of the Master. He is not bound to accept the highest bidder; but ought to consider all the circumstances in the same way as an independent owner would, in letting his own property. But in this case it appears to me that Dr. *Dillon* is altogether unexceptionable as a tenant: he will be bound by covenant to perform his duty, and there is the receiver to look after him; I cannot, therefore, confirm the order of the Master of the Rolls. It was said that by granting this application a great hardship will be done to Mr. *O'Grady*; but some person must suffer, and all I can do is to recommend Dr. *Dillon* to accommodate Mr. *O'Grady* as far as in his power, by giving him the grazing of the lands until he can arrange his affairs.

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Dr. *Dillon* assented; and he was declared tenant at the rent of 175*l.*, he undertaking to reside in the house on the premises.

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RICHARDSON v. NIXON.

Feb. 3, 6, 22.

By marriage articles it was covenanted that a lease for lives and a term for years, the property of the intended husband, and also a lease for lives renewable for ever, and a term for years, the property of the intended wife (which were subject to a mortgage), should be conveyed to trustees; and that

the intended husband should have power to give, devise and bequeath the said lands, or any of them as he should then have in his power, to and amongst the issue of the marriage, in such manner and form as he should by deed or will appoint; and in default of appointment, that the intended wife should have the like power.

The mortgaged lands were afterwards sold under a decree in a foreclosure suit, for more than the sum due under the decree. Subsequently a deed of conveyance and appointment was executed, which purported to convey all the lands, as if they were still existing interests, to a trustee, to the use and intent that E. (a daughter of the marriage), her heirs and assigns, should, during the respective terms for which the lands were holden, have and receive a rent-charge of 36*l.*; and that J. (another daughter), her heirs and assigns, should, in the same manner, have and receive a like rent-charge of 36*l.*, the same to be issuing out of and charged upon all and singular the lands and premises thereby conveyed; and that E. and J., and their respective heirs and assigns, should have powers of distress and entry for the recovery thereof.

The surplus purchase-money was applied, without the privity of the annuitants, in obtaining a renewal of the husband's term for years. The husband's freehold for lives determined by the deaths of the *cestuis que vie*; and afterwards E. died intestate: and her administrator conveyed her annuity to R., who, together with J., filed a bill to raise the amount of their respective annuities:—

Held, 1. That the rents issued wholly out of the freehold; with, nevertheless, a right to distrain on the leasehold for years.

2. That the surplus of the purchase-money was impressed with the continuing character of real estate, as far as it was the produce of the freehold for lives; and that that character could not be subsequently varied, as against the annuitants, without their consent.

3. That, upon the decease of E., intestate, her rent-charge descended upon her heir at law; and that R. was not entitled to it.

4. That where two persons join as co-plaintiffs in respect of separate and distinct titles, neither of them having any interest in the title sought to be enforced by the other, and it appears that one of them has no title, the bill will be dismissed generally, without prejudice to the other co-plaintiff enforcing his title in a separate suit.

5. That the bill was not multifarious.

Semle—That if a rent be granted to A. and his heirs, to be issuing out of a freehold for lives and a term for years, and the freehold afterwards determines, the rent-charge does not alter its character, and become a chattel interest.

GEORGE NIXON was, in the year 1779, possessed of the lands of Lurgan, in the county Cavan, which he held under a lease for nineteen years, with a *toties quoties* covenant for the renewal thereof, from *William P. Newburgh*, the immediate lessee of the Bishop of Kilmore; and was also seised of several houses and tenements in the town of Belturbert, under a lease for three lives: and being about to be married to *Elizabeth Johnston*, the only daughter of *Jane Johnston*, who was entitled to the lands of Grane, held under a lease for lives renewable for ever, and to the lands of Derryinch, held under a lease for eighteen years,

with a *toties quoties* covenant for renewal (both which lands were subject to a mortgage executed to *John Deeryn*, in the same year, to secure the repayment of the sum of 1000*l.*), articles dated the 24th of *August*, 1779, were executed, whereby it was agreed, that in consideration of the intended marriage, and the portion of *Elizabeth Johnston*, *George Nixon* and *Jane Johnston* should convey to two trustees therein named, and their heirs, executors, &c., the before-mentioned several lands, in trust and to the use of *George Nixon*, for his life ; and in case he should die before *Elizabeth Johnston*, and that there should be issue of the marriage, then it was agreed that *George Nixon* should have power to give, devise, bequeath, and make over the said lands and tenements, or such of them as he should then have in his power, custody or possession, to and among such issue, in such manner and form, and at such time, as he should by deed or will appoint ; and for want of such appointment, that then *Elizabeth Johnston* should have the same power and authority to dispose of the said lands and tenements to and among such issue, and in such manner and form, as *George Nixon* was thereby empowered to do. And it was agreed that *George Nixon*, or *Elizabeth Johnston* (in case she should survive him), should have power to charge the lands with the sum of 1200*l.*, to be disposed of by *George Nixon* amongst such children of the marriage as should not receive or be entitled to any part of the real and personal estate of *George Nixon*, under the power before vested in him ; and for want of such disposition by *George Nixon*, that then *Elizabeth Johnston*, in case she should survive him, should have the same power ; the disposition to be made by deed or will. And it was also agreed, that in case *Elizabeth Johnston* should survive *George Nixon*, and that there should be issue of the mar-

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riage then living, she should receive the annual sum 80*l.* out of the said lands during her life. And *George Nixon*, for himself, his heirs, executors, &c., covenanted with the trustees, that in order to render the title to lands of Grane and Derryinch more permanent, and make the mortgage thereof to *John Deeryn* more valid and effectual, his heirs and assigns would from time to time, often as occasion should require, renew the interests in the lands with the respective landlords thereof; but in case they should neglect to do so, that then it should be lawful for the trustees and their heirs to renew the same respective

The marriage was afterwards celebrated; and there issued of it six sons and three daughters, all of whom survived *George Nixon*. Upon the 29th of January, 1794, the personal representative of *John Deeryn* filed his bill to discharge the mortgage of 1779; and in February, 1795, a decree for a sale of the lands comprised therein was made. In pursuance of that decree the lands were, in November, 1796, sold together to *Patrick Ewing* for the sum of 2000*l.*; and after paying thereout the sum due on foot of the mortgage and decree, for principal, interest and costs, there remained in Court a surplus amounting to the sum of 702*l.* In March, 1805, *George Nixon* died intestate and without having executed the power of appointment given to him by the marriage articles, leaving his wife and nine children surviving. By indenture, dated the 11th of June, 1805, made between *Elizabeth Nixon*, therein described as the widow and administratrix of *George Nixon* and also heiress at law and administratrix of *Jane Johnson* of the first part; *Andrew Nixon*, eldest son and heir at law of *George Nixon*, of the second part; and *Humphrey Nixon*, surviving trustee in the marriage articles of the 24th

August, 1779, of the third part : after reciting (*inter alia*) the power of appointment thereby given to *Elizabeth Nixon*, in default of appointment by *George Nixon* ; the death of *George Nixon*, leaving issue of the marriage, and that he died without exercising the power given to him, and that she was desirous to exercise the several powers and authorities by the articles to her granted, so as to make a final settlement and distribution of the lands and premises, in the manner thereafter mentioned, to and amongst her said children ; *Elizabeth Nixon* and *Andrew Nixon*, according to their respective interests therein, granted and released unto *Humphrey Nixon*, his heirs, executors, &c., all the before-mentioned towns, lands, and premises, to hold the same according to the nature and quality of the interests therein, for the respective terms for lives and years thereof respectively yet to come and unexpired ; upon trust in the first place, for the several uses, intents and purposes in the articles mentioned, so far as the same could then be performed, and especially to the use, intent and purpose, that *Elizabeth Nixon* and her assigns, during her life, should receive thereout the said jointure or annuity of 80*l.* sterling, payable in such manner, and at such times, and with such powers and remedies for recovery thereof as were by the articles limited and provided, and particularly with power to distrain and enter in case of nonpayment of the said annuity or jointure : and, subject thereto, to the use and intent that *Mary Anne Nixon* (who was one of the daughters of the marriage, and a person of weak mind) should receive and take, during her life, an annuity or yearly rent-charge of 60*l.* ; and to the further use, intent and purpose that *Elizabeth Nixon* the younger (one other of the daughters of the marriage), and her heirs and assigns, “ shall and may, yearly and every year, during the respective terms for which the said lands are holden, and

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all further renewals thereof, have and receive an annuity yearly rent-charge of 36*l.* sterling; and that the said *John Nixon* (the other of the daughters), her heirs and assigns shall and may, yearly and every year, during the said respective terms and future renewals thereof, have and receive one annuity or yearly rent-charge of 36*l.* sterling; the said several annuities or yearly rent-charges to be issuing out and charged and chargeable upon all and singular the lands and premises aforesaid: and that the said *Mary Anne* and her assigns, and the said *Elizabeth* and *Jane*, respectively, and their respective heirs and assigns, shall and may have and be entitled to such powers and remedies for recovery of the said several rent-charges, and all arrears thereof, as costs attending the recovery thereof, as are hereinbefore and in the said articles granted and provided for recovery of said annuity or jointure of 80*l.*; and the said several annuities or rent-charges to be paid and payable at such time and times, and in such manner, as in said articles provided and concerning the said jointure or annuity of 80*l.*” An subject thereto, to convey and assign the said lands and premises to and amongst the six sons of *George* and *Elizabeth Nixon*, their heirs, executors, &c., equally to be divided amongst them as tenants in common: and *Elizabeth Nixon* directed that the 1200*l.* should not be raised; and that the annuities provided for her daughters, and the shares of the lands appointed to her sons as aforesaid, should be in full satisfaction of such rights and portions as he, she, or they could or might be entitled to under the articles.

After the execution of the indenture of June, 1805, and before the decease of *Elizabeth Nixon*, hereafter mentioned, the lease of the lands of Belturbert expired; and thereupon the leasehold premises held under the see of Kilmore, and

the residue of the purchase-money of the mortgaged estates, became the only property subject to the trusts of the settlement of 1805. In the year 1812, the interest of *William P. Newburgh*, the immediate lessee of the Bishop of Kilmore, in the lands of Lurgan, was purchased by the trustee of the settlement of 1805, for the benefit of the persons entitled thereunder; and the purchase-money, 200*l.*, was paid out of the money remaining in Court after payment of *Deeryn's* mortgage. Immediately afterwards, application was made to the Bishop of Kilmore to renew the lease; which, however, he refused to do except upon payment of the sum of 1553*l.* 2*s.* 8*d.* as a fine, and at an increased annual rent, and upon payment of an increased annual fine. These terms having been complied with, the residue of the money in Court was paid to the Bishop in part payment of the fine, and a mortgage of the lands was given to secure the payment of the rest; and a renewal was thereupon, in the year 1814, granted by the Bishop. The money in Court was applied in payment of the purchase-money and renewal fine, without the consent or knowledge of *Elizabeth Nixon*, the younger, or *Anne Nixon*; and at the time when the money was applied in payment of the renewal fine, *Elizabeth Nixon* was a *feme covert*, she having, in the year 1814, married *Adelbert D'Oisy*. She died in 1826; and her husband, having obtained administration to her, in 1840 conveyed the annuity of 36*l.*, limited to her by the settlement of 1805, to *Jonathan Richardson*, in consideration of 600*l.*

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The bill was filed by *Jonathan Richardson* and *Jane Nixon*, praying that the annuities or yearly rent-charges, of 36*l.* and 36*l.*, might be decreed to be respectively well charged upon the lands of Lurgan; and for an account

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of what was due to the plaintiffs respectively on foot there and for payment by the defendants; or in default thereof that the lands of Lurgan might be sold, and that out of produce of such sale, the plaintiffs and all persons entitled thereto might be paid the sums appearing to be due to them respectively; and for a receiver.

Mr. Major, Mr. Sheil, and Mr. Gresson, for the plaintiffs.

Three questions are raised by the answers. First, it is said that the bill is multifarious, for that the plaintiffs are not entitled to join in the suit. But though the annuities are separate and distinct, they are created by the same instrument; and the plaintiffs have a common interest in the questions raised, and are therefore entitled to join in the suit. If two suits had been instituted, the same persons must have been made parties to both suits, and the questions in each would have been the same. *Monsera Cheyne*(a); *Campbell v. Mackay*(b). *Ward v. The Duke of Northumberland*(c) was rather a case of misjoinder of the subject matter of the suit, than of multifariousness. Secondly, the defendants insist that the plaintiffs are bound to contribute to the payment of the renewal fines to the Bishop of Kilmore; the renewal having been made for the benefit of all persons claiming under the articles of 1785 and the settlement of 1805. For this, *Winslow v. Tigh*, and *Stubbs v. Roth*(e), will be cited. These were cases of annuities bequeathed by will; but in *Moody v. Matthews* and *Maxwell v. Ashe*(g), where the annuity was created

(a) Hayes, 69.

(b) 1 M. & C. 603.

(c) 2 Anst. 69.

(d) 2 B. & Beat. 195.

(e) 2 B. & Beat. 548.

(f) 7 Ves. 174.

(g) 1 B. C. C. 444, n.

by deed, it was held that the annuitant was not bound to contribute. Thirdly, the defendants say, that the annuitants ought to abate, because the lease of the houses at Bel-turbert has expired. That proposition cannot be sustained. A fourth question is raised at the bar. It is alleged that the plaintiff, *Richardson*, has not shown a title to the annuity granted to *Elizabeth Nixon*. That annuity is a chattel interest. Though granted to *Elizabeth Nixon* and her heirs, it issues out of a chattel lease ; and on the decease of *Elizabeth* it vested in her personal representative, who conveyed it to *Richardson*.

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Mr. Christian and Mr. Ball for *Andrew Nixon*.

There is a misjoinder of plaintiffs. The annuities, though granted by the one deed, are separate and distinct, and it might be necessary to make separate defences to the claims on foot of them. Each plaintiff has a distinct right of suit, and they cannot, therefore, join as co-plaintiffs ; *Hudson v. Maddison*(a) ; *Jones v. Garcia del Rio*(b). This objection, if raised by the answer, as it is here, may be taken by the defendant at the hearing ; and even though not raised by the answer, yet the Court itself will take it, if it thinks fit to do so, with a view to the order and regularity of its proceedings ; *Greenwood v. Churchill*(c) ; *Anderson v. Wallis*(d).

[The LORD CHANCELLOR.—By the same deed, and by the same words of limitation, a perpetual annuity is granted to one of the daughters, and another perpetual annuity to

(a) 12 Sim. 416.

(b) Turn. & R. 297.

(c) 1 M. & K. 559.

(d) 4 Y. & C. 336 ; affirmed on appeal, 1 Phil. 202.

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another of the daughters ; and the annuities are charged in the same manner upon the same property. They file a bill to establish their rights to the annuities, which involve the same points of law. Each is a necessary party to the bill of the other ; for the questions raised are as to the liability of the annuitants to contribution and to abate : I therefore think that they may join as co-plaintiffs in the suit].

The next question is, whether *Richardson* has shown title in himself to the annuity granted to *Elizabeth Nixon*. He claims it as a chattel interest, and derives title to it through the administrator of *Elizabeth Nixon* ; but the defendant submits that it is a freehold interest, and that, at the decease of *Elizabeth*, it descended on her heir at law. By the deed of 1805, an annuity or rent-charge was granted out of the settled lands to the grantee and her heirs. Some of the lands were held for lives, and others for terms of years ; and the grant was by way of conveyance to uses. In such a case the rule of law is, that the rent issues wholly out of the freehold lands, and the term for years is only charged with a distress ; *Butt's case*(a). Co. Litt. 147, The rent, therefore, was a freehold rent when it was created and its character was not altered by the subsequent determination of the freehold estate out of which it issued. In *Butt's case*, pp. 103, 104, this case is put : One grantor grants a rent out of the manor of D., and further grants that if the rent be behind, the grantee shall distrain for the same rent in the manor of S. ; “ and the opinion of *Finchden* in 41 Edw. III. c. 15, was affirmed for good law, that if the manor of D., out of which the rent is granted, be recovered by *eignè* title, all the rent is extinct :” which

(a) 7 Rep. 101.

shows that, upon the determination of freehold estate out of which it issues, the rent does not issue out of the chattel ; but it becomes either a rent-seck descendible to the heir of the grantee, with a power of distress on the chattel term, or it becomes a mere annuity descendible to the heirs of the grantee ; that is, a personal inheritance. A rent may be a rent-charge at one time and a rent-seck at another ; as in the case put in *Butt's case*, p. 104, of a rent-charge for the life of the grantee, and a rent-seck afterwards. Again, a grant of an annuity to a man and his heirs, though charged upon personal estate only, is a personal inheritance, descendible to the heirs of the grantee ; *Turner v. Turner*(a) ; *Earl of Seaford v. Buckley*(b) ; *Taylor v. Martindale*(c).

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[The LORD CHANCELLOR.—If the freehold estate, upon which the annuities were charged, was sold for more than was requisite to pay off the mortgage, the residue of the purchase-money would still retain the character of real estate, and, though invested in obtaining a renewal of the chattel interests, would continue to be an interest of a freehold nature.]

If then the bill must be dismissed as to the case made by *Richardson*, how can the Court give a decree for the other co-plaintiff ? This is not a question of multifariousness ; it is the case of one plaintiff having a good right of suit, in which the other is not interested ; the other co-plaintiff claiming under a separate and distinct title, but having no right of suit whatever. The authorities establish that the bill must be dismissed altogether ; *Cowley v. Cowley*(d) ;

(a) 1 B. C. C. 316.

(b) 2 Ves. 170.

(c) 12 Sim. 158.

(d) 9 Sim. 299.

1845. *Denton v. Davy(a)* ; *Hudson v. Maddison(b)* ; *Bill Cureton(c)* ; *Cholmondeley v. Clinton(d)*. The cases *Jemmel v. Block(e)* ; and *The King of Spain v. Mac do(f)*, were different ; in them there was but one cause suit, and one of the two co-plaintiffs was not entitled.

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The annuitants are bound to contribute to the renewal fines ; and if relief be given in this suit, the decree ought contain special directions on the subject. The residue of the purchase-money of the mortgaged estates, which, with the interest thereon, exceeded, in 1814, the sum of 9000 was applied in part payment of the renewal fine. That renewal was obtained for the benefit of all the persons claiming under the settlement of 1805 ; and it is not equitable that the expense of it should be cast upon some of the parties. *Moody v. Matthews(g)* does not apply ; that was the case of a debtor seeking to compel his creditor to contribute to the renewal fine ; but *Winslow v. Tighe(h)*, and *Stubbs v. Roth(i)*, supply the principle applicable to this case ; for the parties claim under the same limitation and appointment ; and if the power had been strictly pursued, portion of the estate itself, and not rents out of it, would have been limited to the daughters ; in which case there would be no question as to their liability to contribute.

Mr. *James Shiel*, in reply.

As to the claim for contribution : the annuities are charged upon all future renewals of the lease, which distinguishes this case from those before Lord *Manners*.

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| (a) 1 Moore's Privy Council Cases, 15. | (e) 2 Dick. 513. |
| (b) 12 Sim. 416, 418. | (f) 4 Russ. 225. |
| (c) 2 M. & K. 503. | (g) 7 Ves. 174. |
| (d) 2 J. & W. 191. | (h) 2 B. & Beat. 195. |
| | (i) 2 B. & Beat. 548. |

The answer does not question the right of the administrator of the annuitant to assign the annuity to the plaintiff, *Richardson*; it merely puts the plaintiff upon proof of the fact of the assignment; and it is admitted therein, that three half-yearly gales of the annuity is due.

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[The LORD CHANCELLOR.—The plaintiff must recover by force of his own title.]

The point comes upon the plaintiffs by surprise. As to the residue of the purchase-money of the mortgaged estates being the produce of the freehold lands, that is a mere assumption; for it appears that a valuable leasehold interest was also subject to the mortgage, and was sold at the same time to the same purchaser. Both the estates were sold together.

The LORD CHANCELLOR directed the cause to stand in the list, to be spoken to by one counsel on each side.

Mr. *Gresson* for the plaintiffs.

The Court will struggle against the application of the doctrine in *Butt's case* to the present. The construction suggested by it is contrary to the intention of the parties, and would have the effect of wholly defeating the claims of the annuitants; for the deed of 1805 did not create annuities charging the person of the grantor; and if they are not now issuing out of the lands, they have wholly ceased to exist. In *Butt's case* it is said: "If a man by deed grant a rent of forty shillings to another, out of his manor of D., to have and perceive to him and his heirs; and grants further, by the same deed, that, if the rent be behind, the

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grantee shall distrain in the manor of S., the rent is o
 issuing out of the manor of D., and it is but a penalty t
 he may distrain in the manor of S. : but if I grant unto y
 that you and your heirs shall distrain for a rent of fo
 shillings within my manor of S., this by construction
 law, shall amount to a grant of a rent out of my manor
 S." This shows that the same words will be differen
 construed *secundum subjectam materiam*. The power is
 appoint the settled lands, or such of them as the appoint
 should then have in his or her power : this contemplates t
 future determination of the freehold interest ; and the reaso
 able construction of the instruments is, that on the expirati
 of the freehold leases, the annuities should issue out of t
 chattel terms. Another answer to the argument of the
 defendants is, that the legal estate in the terms for years v
 vested in the trustee of the settlement of 1805, upon tr
 to permit the annuitants and their heirs to receive there
 their respective annuities. The trust for the annuitant
 a chattel interest, and, on the death of one of them, ves
 in her personal representative. As to the surplus of
 purchase-money of the mortgaged lands, it is to be obser
 that the annuities are not charged on it by the deed of 18
 and whatever right the daughters might have to it under
 articles of 1779, is excluded by the settlement of 1805,
 which it is declared, that the annuities given to them s
 be in satisfaction of their claims under the articles.

Mr. Christian for Andrew Nixon.

The construction contended for by the defendant will
 defeat the intention of the parties, but will rather carr
 out. The deed of 1805 is technically drawn, and is pre
 and accurate in its terms when limiting an estate. Anot
 annuity is by it limited to the grantee and her assigns

her life; and the lands themselves are limited to the trustee, his heirs, executors, administrators, and assigns, according to the nature and quality of the interests therein, for the respective terms for lives and years thereof respectively yet to come and unexpired. Full effect must therefore be given to the limitation of the annuity to *Elizabeth Nixon* and her heirs. The opinion of *Finchden*, which in *Butt's case* was affirmed to be good law, and *Com. Dig. Annuity* (A. 2), establish, that on the determination of the freehold estates, out of which this rent issued, it became a mere personal annuity; but still an hereditament descendible to the heirs of the grantee. Where the chattel is charged, not with the rent but with the remedy, there is no necessity for holding that the rent partakes of the nature of that out of which it is to be paid.

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The annuities are charged upon the surplus purchase-money. The deed of 1805 purports to charge them upon the lands which had been previously sold under the decree of the Court. The effect of that is to charge them on the residue of the purchase-money, which still, in the view of a Court of Equity, is a part of the settled lands: and as the mortgage ought to have been paid, rateably, out of the mortgaged real and chattel lands, the money in Court, or some part of it, must now represent the real estate sold under the decree. There is, therefore, a freehold estate still existing, out of which this annuity or rent-charge issues.

The LORD CHANCELLOR :

I shall consider this case. At present I am inclined to think that the point which I suggested will decide it, viz., that there never has been a period when there was not a freehold estate, within the contemplation of this Court, liable to

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the payment of the rent-charge : for, although these den-
 minations were sold before the appointment was made, they
 are treated by the appointment as existing interests ; and
 to the extent of the surplus, they were so. If so, there
 is no question : for the annuity is then charged upon real
 estate, and is limited to the heirs of the grantee ; it is
 therefore, descendible only to the heirs, with the benefit of
 a charge, by way of distress, upon the chattel interests.
 The question will then arise whether the bill can be main-
 tained at all. I fear that it cannot. It is not like some
 of the cases, in which a party having no interest in the subject
 matter of the suit is joined as a co-plaintiff.

Judgment. THE LORD CHANCELLOR :—

In this case, under an agreement for a settlement of free-
 holds for lives and leaseholds for years, a settlement was
 made by the husband's heir at law, and by the wife,
 whom the legal estate in the several properties was vested
 upon the children ; and a separate annuity or rent-charge
 was limited to each of two daughters, her heirs and assigns.
 The leaseholds for lives have since determined, but the
 chattel interests still remain. One of the daughters died.
 The bill is filed by the surviving daughter, and by the
 assignee of the personal representative of the deceased
 daughter, as co-plaintiffs, to have their annuities paid.
 It was insisted for the defendant that the estate of the deceased
 daughter in her annuity has descended to her heir at law,
 and that consequently there is a misjoinder of plaintiffs, and
 the bill must be dismissed.

There is no doubt, I think, that the annuities issued wholly out of the freeholds for lives, with, nevertheless, a right to distrain on the leaseholds for years, according to the settlement. This was so laid down in *Butt's case*(a), and has never been disputed. The rent-charge cannot, I think, by subsequent accident, alter its character, although the remedy may not be the same. In this case there is a peculiarity. The wife's freehold for lives, and leasehold for years, were mortgaged previously to the marriage; and before the settlement in 1805, these estates had been sold under a decree at the suit of the mortgagee. But there was a considerable surplus of the purchase-money. Now the settlement of 1805, without noticing the sales, actually conveyed (in words) the mortgaged estates which had been sold. The surplus money was afterwards, without the privity of the daughters, paid for renewals and for the purchase of the head lease of the husband's leasehold for years. But it appears to me that the settlement of 1805 must be considered to have impressed the surplus money with the continuing character of real estate, as far as it was the produce of the freehold for lives; and that character could not subsequently be varied against the daughters, the annuitants, without their consent. I think, therefore, that this must be deemed to be real estate, in the view of this Court, still liable to the annuity. This is important only as an answer to an objection, that, there being no longer any freehold out of which the annuities can issue, they have become chattel interests. The facts of the case render it unnecessary to consider this objection further.

As, then, the assignee of the personal representative, who

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(a) 7 Rep. 101.

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is a co-plaintiff, has no claim, can the bill be maintained in favour of the surviving daughter? Where the co-plaintiffs have conflicting interests, I think that Lord *Redesdale's* opinion in *Cholmondeley v. Clinton*(a) must prevail; although in the argument, the defendant's counsel seem to have thought that it would have been sufficient to strike out Lord *Cholmondeley's* name, as having no interest in the subject matter. Where a co-plaintiff has not any interest, it is properly settled that a demurrer or plea to the bill will lie: *Cuff v. Platell*(b); *Makepeace v. Haythorne*(c); and *The King v. Spain* v. *Machado*(d). In *Bill v. Cureton*(e), and *Glynn v. Soares*(f), it was laid down, that the objection may be made at the hearing of the cause. This was followed by the case of *Denton v. Davy*(g), in the Privy Council, where two trustees were co-plaintiffs, and both claimed commission on the sale of an estate, and one claimed commission on the receipt of rents. The validity of the latter claim was admitted; but the joint claim was held to be invalid, and the bill was dismissed as to both claims: for it was said to be a settled rule of the Court, that where a party is made a co-plaintiff having no interest whatever in the object sought by the other co-plaintiff, and the bill can only be sustained in respect of that object, it cannot be sustained at all. But it was said, that if the case had been the other way, and the claim made by the two plaintiffs could only be sustained as to one, the bill might have been dismissed as to the demand of one plaintiff, and retained as to the other; for then there would be a party on the record, interested in some part of the subject in question: but it would, perhaps, be difficult

(a) 2 J. & W. 191.

(b) 4 Russ. 242.

(c) 4 Russ. 244.

(d) 4 Russ. 225.

(e) 2 M. & Kee. 512.

(f) 3 M. & Kee. 470.

(g) 1 Moore, P. C. Cases, 15.

to maintain this view consistently with the actual decision.

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There is, however, considerable authority the other way. In *Gemmel v. Block*(a), Lord Bathurst, after consideration, dismissed the bill against one of two co-plaintiffs, who sued upon a joint demand but failed; and made a decree in favour of the other plaintiff, in whom solely the right was vested. The case of *Moseley v. Taylor*, cited in 2 Y. & Jer. 520(b), and in 1 Kee. 619, and *Raffety v. King*(c), which I followed in *Cashel v. Kelly*(d), are authorities against allowing advantage to be taken, at the hearing, of a misjoinder by adding a formal or unnecessary plaintiff. But in *Cowley v. Cowley*(e), where A. claimed an annuity under a deed, and also charges under the will of the grantor, and B. claimed charges under the will only, and they were co-plaintiffs, and the claim of both under the will was not established, whilst the claim of A. under the deed was admitted, the Registrar's book was searched for the case of *Gemmel v. Block*; and the Vice-Chancellor was at first disposed to grant relief to A. under the deed, and to dismiss the bill as to both plaintiffs as to their claims under the will: but upon conferring with the Lord Chancellor, who thought the bill ought to be dismissed generally, he adopted that course.

I have gone through the authorities, for I am unwilling to attempt to disturb that which has been so recently settled; but I would not, unless coerced, allow the objection at the hearing, where there was no conflict of interest; nor am I prepared to say that I should allow the objection at

(a) 2 Dick. 513.

(b) *Nomine, Moreley v. Lord Hacke.*

(c) 1 Kee. 600.

(d) 2 Dru. & War. 183.

(e) 9 Sim. 299.

1845. the hearing in all cases. Here one of the co-plaintiffs has wholly failed to establish any claim to the annuity issued out of the common fund; and therefore, as to him, there can be no relief: the other plaintiff has established her title to her annuity; but she has brought before the Court, as co-plaintiff, a person who has no interest in the suit; and although the co-plaintiffs did not, by the bill, claim a joint interest in one subject, yet I cannot distinguish the case from those to which I have referred.

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The bill must, therefore, be dismissed; and this renders it unnecessary to consider the question of contribution. The dismissal is to be without prejudice to *Jane Nixon* filing bill for her annuity, and is to be without costs, as the nature of the objection was not stated in the answer. I should have been better satisfied if I had been at liberty to follow Lord *Bathurst's* decision.

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Feb. 6, 8, 22.

A sum of 1000*l.* was, by deed of 1805, vested in *A.*, in trust for his daughter, *M. G.*, until she attained the age of twenty-five years, or married; and at attaining that age, or day of marriage, to permit *M. G.* to receive the interest during life; and after her decease, for her issue, as she should appoint; and, in default of appointment, equally; but in case she should die previous to twenty-five, or day of marriage, without issue, then over to the other children of *A.*

On the marriage of *M. G.*, *A.*, by settlement of 1824, vested in trustees securities money exceeding 1000*l.*, upon trust for the separate use of *M. G.*, for her life; and, at her decease, for the use of the children of the marriage, as the intended husband should point; and, in default of appointment, equally; and, in default of such issue, for the intended husband, his executors, &c. This settlement did not refer to the deed of 1805.

Held, that the provision made for *M. G.*, by the settlement of 1824, was a satisfaction of her claims under the deed of 1805, though it did not appear that the husband was aware of his wife's claim thereunder.

A provision by a father, on the marriage of his daughter, of a greater sum than he owes her, is, in general, to be deemed a payment of the debt; and it is not necessary that there should be an express stipulation to that effect, or to show that the husband knew of the debt.

Dreer v. Bidgood, 2 Sim. & St. 424, disapproved of.

a mortgage and judgment collateral therewith, and being also entitled to other sums of money secured by judgments, and to several leaseholds for long terms for years, executed a settlement, dated the 5th of November, 1805, whereby, in consideration of his love and affection towards his grandchildren, *Patrick Garvey*, the younger, and *Mary Garvey*, the children of his son, *Thomas Garvey*, and to secure a maintenance and provision for them, he granted and assigned unto *Edward Murphy*, *Peter St. Leger*, and *Thomas Garvey*, his only son, the said several sums of money, and the securities upon which they were invested, and also the said leasehold lands, upon trust to permit him, the said *Patrick Garvey*, to receive the rents of the lands, and the interest of the money, during his life; and after his decease, in trust as to the rents of the lands and the interest of the trust funds (other than the 1000*l.* secured by *Warburton's* mortgage and judgment), for *Patrick Garvey*, the younger, until he should attain the age of twenty-five years, or day of marriage; and after he should attain the age of twenty-five years or marry, then in trust to permit him, during his life, to receive the rents of the lands and the interest of the money: but in case he should die before attaining said age or day of marriage, or, having attained said age or being married, should die without issue, then in trust for such other sons as *Thomas Garvey* might have; the elder son and sons always taking precedence of the younger: but in case *Patrick Garvey*, the younger, should die leaving issue, then in trust for such issue, in such manner, shares, and proportions as he should appoint; and in case he should die without issue, and that there should not be any son or sons of *Thomas Garvey* living at the time of his death, in trust for *Mary Garvey*; or, if there should be more than one daughter of *Thomas Garvey* living at the

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time of his death, then in trust for said daughters, share & share alike. And as to the sum of 1000*l.*, secured by *Wiburton's* mortgage and judgment, upon trust that the trustees should receive the yearly interest and produce therefor the use and benefit of *Mary Garvey*, until she attain the age of twenty-five years, or married with their consent and approbation ; and after her attaining that age, or death of marriage with consent, in trust to permit her and her assigns, during her life, to receive and take, to her and their own proper use and benefit, the yearly interest and produce thereof ; and after her decease, in case she should have issue, in trust for the use and benefit of such issue in such manner, shares, and proportions as she should by deed or will appoint ; and, in default of appointment, equally amongst them : but in case she should die previous to her attaining the age of twenty-five years or death of marriage with consent, or, having attained said age or being married, should die without issue, then the 1000*l.* was to go to the other daughters of *Thomas Garvey*, therein mentioned ; but in case there should be no such daughters, then the 1000*l.* was to go to such son or sons of *Thomas Garvey* as should be living at the time of *Mr Garvey's* death ; and, if more than one, to be equally divided amongst them. The settlement contained the usual power to call in the trust funds and invest them upon other securities.

Patrick Garvey, the settlor, died in 1811 ; and the trustees upon *Thomas Garvey* entered into receipt of the income of the trust property ; and, the other trustees having declined to interfere in the trusts, he alone acted. The other trustees had since died.

In the year 1824, *Mary Garvey*, being then under the age of twenty-one years, married *Roger Hayes*, with the consent of her father. Upon that occasion, a settlement, dated the 27th of October, 1824, was executed, whereby, after reciting that *Thomas Garvey* had obtained judgment against *David O'Neill Power*, upon a bond for 1000*l.* principal money; and had also covenanted to pay to the trustees of the settlement a further sum of 100*l.*, to be by them placed out at interest, on good and sufficient security, for the intents and uses after mentioned; *Thomas Garvey*, in consideration of the intended marriage, and as a marriage portion for *Mary Garvey*, his daughter, assigned to the trustees therein named the said judgment, and the said sum of 100*l.*, to be invested in good and sufficient security, in trust to permit *Mary Garvey*, during her life, to take and receive, to her sole and separate use and benefit, yearly and every year, all interest that might accrue due on foot of said securities, so and in such wise and to the intent, that the said yearly payment of interest might not be subject or liable to the debts and engagements of *Roger Hayes*, or of any future husband with whom she might intermarry, but might be absolutely at her own separate and exclusive disposal, in the same manner as if she were sole and unmarried; and that the receipt of *Mary Garvey*, or of any person whom she should appoint to receive the same, should, notwithstanding her coverture, be a sufficient discharge for so much as should be therein expressed to be received: and after her decease, as to the principal sum of said judgment and securities, so to be invested, to the use of such child or children of *Roger Hayes*, on the body of *Mary Garvey* to be begotten, in such shares and proportions as *Roger Hayes* should by deed or will appoint; and in default of such appointment, then to such

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child, if only one, or to such children, if more than one, share and share alike : and in default of all such issue, the use of *Roger Hayes*, his executors, &c. And after further reciting that *Thomas Garvey* was entitled to a bond of *E. J. Murphy*, conditioned for the payment of the sum of 2500*l.*, and that upwards of three years' interest was due thereon, *Thomas Garvey*, for the considerations before mentioned, covenanted to pay to the trustees of the said indenture one-third part of all such sums of money as should at any time thereafter, received on account of said bond or mentioned judgment(a), to be by them placed out on good and sufficient security, to be approved of by *Roger Hayes* and *Mary Garvey*, or the survivor of them ; and the interest and principal thereof to be payable in like manner to *Mary Garvey*, and, after her decease, subject to the same power of appointment as had already been declared in relation to the money due upon the lands of *Daniel O'Nolan Power*, and the said sum of 100*l.* And after further reciting that *Roger Cashin*, the grandfather of *Roger Hayes*, having seized of the lands of Shanballyroe, under a lease for life renewable for ever, he, in consideration of the intended marriage portion, and of his love and affection for his grandson, *Roger Hayes*, conveyed the lands to the same trustees and their heirs, upon trust, after deducting the rents and taxes, to pay the clear residue of the rents and profits thereof, as the same should become due and payable, to *Mary Garvey*, during her life, or unto such person or persons as she should, from time to time, by writing under hand and seal, appoint to receive same ; to the end that the same might be for her sole and separate use and benefit, and not subject to the control, debts, or engagements of her

(a) Judgment had been entered on the bond.

intended or any future husband ; and that her receipt, notwithstanding her coverture, should be a sufficient discharge for same : and after her decease to the use of the children, whether male or female, of *Roger Hayes*, on the body of *Mary Garvey* to be begotten, for such estates, and in such shares and proportions, as *Roger Hayes* should by deed appoint ; and, in default of such appointment, to the use of all the said children, equally, as tenants in common, and their heirs ; and if but one child, to such child and his or her heirs : and in default of all such issue, to the use of *Roger Hayes* and his heirs.

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Shortly after the marriage, *Thomas Garvey*, at the request of *Roger Hayes*, paid him the sum of 1100*l.* ; and *Thomas Garvey* afterwards received the money due on foot of *Power's* judgment, and applied it to his own use. He also empowered *Roger Hayes* to receive, from time to time, by yearly instalments, several sums of money due on foot of *Murphy's* bond ; which *Hayes* accordingly received to an amount exceeding 2000*l.*, which was much more than the one-third of the money secured by the bond, and settled by the indenture of 1824. *Roger Hayes* applied the moneys so received by him to his own use.

Patrick Garvey, the younger, died, under age and unmarried : and thereupon *Pierce Garvey*, his eldest brother, became entitled under the deed of 1805. There were several other sons and daughters of *Thomas Garvey* living.

The bill was filed by *Mary Hayes* and her infant children, by their next friend, against *Thomas Garvey*, *Roger Hayes*, and *Pierce*, the eldest son of *Thomas Garvey*, charging that *Thomas Garvey* never commu-

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nicated to *Mary Hayes* at any period of her life, or to her husband, or any one on their behalf, that the plaintiffs were entitled to any sum of money under any deed from *Patrick Garvey*, but studiously concealed the existence of the deed of 1805 : and praying that the trusts of the deed of 1805 might be carried into execution ; and that an account might be taken of the property which passed thereunder and how and by whom the same had been applied and disposed of ; and if it should appear that any part of the trust funds had been received by or with the privity or assent of *Thomas Garvey*, or that same had been lost or misapplied by his wilful neglect or default, that then he might be decreed to be personally responsible for, and to pay the same.

Thomas Garvey, by his answer, stated, that he paid to *Roger Hayes*, and permitted him to receive the moneys on account of *Murphy's* bond, at the urgent request of the plaintiff, *Mary*, and upon the express promise to *Roger Hayes* that he would invest same upon good security. He said that he often informed the plaintiff, *Mary*, of her rights under the deed of trust ; and that she was fully apprized that she and her children were entitled to a sum of 1000*l.* from her grandfather, under the trusts of the deed of 1805. He denied that he studiously or at all concealed from the plaintiff, *Mary*, the existence of the deed of 1805, or the nature or extent of her rights thereunder : and said that the nature of that deed, and her rights thereunder, were well known in his family, and were the subject of frequent conversation among them. He said, that the provision made for *Mary Hayes*, by the settlement of 1824, was meant and intended by him and by those concerned for the plaintiff, *Mary* and her husband, *Roger Hayes*, to be in full satisfaction for all her claims under the deed of 1805, and was so accepted by

her; and that such intention was not expressed in the settlement of 1824, because the defendant was ignorant that it was necessary to do so: that the 1000*l.* due on *Warburton's* mortgage and judgment was received by him, and was afterwards lent by him to *Edward Joseph Murphy*, and formed part of the sum of 2500*l.* secured by the bond of *Murphy*, and mentioned in the settlement of 1824: and submitted, that as the bill only sought for an execution of the trusts of the deed of 1805, it ought to be dismissed, as the plaintiffs were no longer interested in those trusts; but that if the provision made for *Mary Hayes*, by the settlement of 1824, was not a satisfaction of her claims under the deed of 1805, then he submitted that her life interest in the 1000*l.*, under the deed of 1805, became, on her marriage, vested in her husband, and that he was the proper person to sue for the same.

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No evidence of fraud, or concealment of the deed of 1805, was given by the plaintiffs.

Mr. *Moore*, Mr. *Pigot*, and Mr. *Foley*, for the plaintiff. Argument.

Mr. *Brooke* and Mr. *Wall* for *Thomas Garvey*.

The settlement of 1824 is a satisfaction of the claims of the plaintiffs on *Thomas Garvey*, under the deed of 1805; and it is not necessary that it should be expressed to be in satisfaction of those claims, or that the husband of *Mary Garvey* should, at the time, have been aware of their existence: *Clave v. Tarrant*(a); *Wood v. Briant*(b); *Seed v. Bradford*(c); *Plunket v. Lewis*(d). The only difference between

(a) 18 Ves. 8.

(b) 2 Atk. 521.

(c) 1 Ves. 501.

(d) 3 Ha. 316.

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those cases and the present is, that here the provision created by the deed of 1805 is not for *Mary Garvey* absolutely, but for her, for life, and afterwards for her children, as she should appoint. But the principle of those cases applies; for *Thomas Garvey*, who stood *in loco parentis* to his daughter and her issue, has, by the settlement of 1824, provided for the objects of the deed of 1805, in a more beneficial manner. If the settlement of 1824 be not a satisfaction, then the question arises, what title has *Mrs. Hayes* to institute this suit? The suit is conversant only with the trusts of the deed of 1805. By it, the interest of the 1000*l.* was given to *Mrs. Hayes* for her life, not to her separate use: *Tyler v. Lake*(a); and on her marriage, her husband, during the coverture, became entitled to it, and he alone is entitled to sue for it. It is said that she may sue in respect of her equity to a settlement out of it; that case is not made by the bill, and cannot be sustained in law.

Mr. Brewster for Pierce Garvey.

The plaintiff has not made a case for relief against him. He is tenant for life of the landed property, with remainder to his issue; and if he should die without issue, then the lands go to *Mary Hayes*.

Mr. Pigot in reply.

The plaintiffs were bound to carry into execution, the whole trust of the settlement of 1805; therefore, *Pierce Garvey* is a necessary party.

[The LORD CHANCELLOR.—I do not see what right the plaintiffs have to file a bill as to the landed property. The

(a) 4 Sim. 144; S. C. on appeal, 2 R. & M. 183.

person who is entitled to it, is in possession. The trusts of the deed are executed as to it.]

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The settlement of 1824 is not a satisfaction of the debt due to *Mary Garvey* ; it does not refer to the deed of 1805, and is expressed to be made for a different consideration : *Drewe v. Bidgood*(a) ; *Chidley v. Lee*(b). In *Durham v. Wharton*(c) Lord *Lyndhurst* draws the distinction between a portion being a satisfaction of a debt and of a legacy. He says : “ Another point raised was this : that, by the terms of the settlement, the 15,000*l.* was to be in satisfaction of all that Mrs. *Wharton* was entitled to under the will of her uncle ; and it was therefore contended, that as this provision was stated to be in satisfaction of a debt due by General *Lambton* (her father), that it could not also be taken to be in satisfaction or ademption of what she would otherwise be entitled to under his will. I have never felt the force of that argument. *It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed ;* but as far as related to the provision by the will, it was not necessary, because that effect is produced by the operation of law.” There is also a considerable difference between the trusts of the 1000*l.* declared by the deed of 1805, and the trusts of the settlement of 1824. In the former, the fund is limited to the wife for life, and then to her issue, as *she* should appoint ; by the settlement, it is given to her for life, for her separate use, and then to the issue of the marriage, as *the husband* should appoint. Mrs. *Hayes* was an infant when she married ;

(a) 2 S. & St. 424.

(c) 10 Bli. 546.

(b) Pre. Ch. 228.

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there could, therefore, be no contract by her to relinq her claims under the deed of 1805 ; still less could the ri of her unborn issue, under that deed, be prejudiced by acts of the parties in 1824. They, at least, have not rece any satisfaction of their claims under the deed of 1805 ; the funds settled in 1824 have been paid to the husb and not to the trustees.

[The LORD CHANCELLOR.—If there be a satisfaction this case, it arises from the intention of the parties to deed of 1824. It cannot be argued, from the subsequ breach of trust, that that which otherwise would be a sa faction is not a satisfaction.]

Mrs. *Hayes* is entitled to maintain this suit in her o right. By the deed of 1805 she is entitled to the produ of the trust fund for her separate use : *Tyrrell v. Hope(a)* *Prichard v. Ames(b)* : but if not, yet she is entitled to in respect of her contingent interest in case she should su vive her husband : or, at all events, the co-plaintiffs, h children, have a right to sue ; and the joinder of M *Hayes*, as co-plaintiff, will not prejudice their right to decree, the objection not having been taken until the her ing : *Rhodes v. Warburton(c)* ; *Cashel v. Kelly(d)*.

Upon the last point, counsel for *Thomas Garvey* ferred to *Anderson v. Wallis(e)*.

(a) 2 Atk. 55.

(b) Tur. & R. 222.

(c) 6 Sim. 217.

(d) 2 Dru. & War. 181.

(e) 4 Y. & C. 336.

THE LORD CHANCELLOR :—

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This bill was filed by Mrs. *Hayes*, the wife of Mr. *Hayes*, and her children, by their next friend, to have the benefit of the settlement of 1805 ; by which *Patrick Garvey*, the grandfather, by a voluntary settlement, assigned to his son, *Thomas Garvey* and two other trustees, 1000*l.* secured by mortgages and judgments, in trust, after *Patrick's* death, for his grand-daughter, *Mary* (the daughter of *Thomas*, and now the wife of Mr. *Hayes*), for her life ; and afterwards for her issue as she should appoint ; and in default of appointment, equally. *Patrick*, the settlor, died in 1811 ; and *Thomas*, his son, being the only acting trustee, received the 1000*l.*, and lent it out, the bill states, as he thought proper. In 1824, upon the marriage of *Mary*, the settlement of that year was executed, by which *Thomas* provided for his daughter, much in amount beyond the 1000*l.* ; but in no part of the settlement is any notice taken of the settlement of 1805, or of *Mary's* rights under it. *Mary* was under twenty-one when she married ; but that circumstance is not, I think, material. The bill alleged a case of fraud and concealment against *Thomas*, which is wholly negatived by the answer. *Thomas* swears that his daughter was fully aware of her rights, and that the settlement of 1824 was really in satisfaction of the debt, and so intended by all parties ; although, Mr. *Hayes* being a barrister, and he himself, being ignorant of forms, the settlement of 1824 was silent on that head.

It was insisted, on the part of the plaintiff, that the settlement of 1824 being for a marriage portion, the satisfaction of a debt was excluded ; and the case of *Drewe v. Bidgood*(a)

(a) 2 Sim. & St. 424.

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was relied upon. I cannot say that I concur in the view taken of that case by the Vice-Chancellor, Sir *John Leach*. The statement that the stock was purchased by the brother with his own money, was, of course, not conclusive ; and the circumstance that the settlement was expressed to be for natural love and affection, Lord *Hardwick* thought, *Wood v. Briant*(a), afforded no argument against the satisfaction. Here the settlement of 1824 is really not open to any such objection : for although a marriage portion was expressed to be provided, yet the provision far exceeded the debt ; and the settlement is so ambiguously framed, as in some manner to leave it in doubt whether *Thomas* really was settling what was wholly his own. The true rule is, I think, laid down in *Wood v. Briant*, which I am prepared to follow : a provision by the father, on the marriage of his daughter, of a greater sum than he owes to her, is, in general, to be deemed a payment of the debt. It is not necessary that there should be an express stipulation to that effect ; *Seed v. Bradford*(b) : nor is it necessary to show that the husband knew of the debt, according to *Chave v. Farrant*(c). I think, therefore, that, even if the case rested here, the settlement would be a satisfaction. But *Thomas*, the father, alleges that the 1000*l.* settled in 1805 and received by him, actually formed part of the money lent to Mr. *Murphy*, one-third of which was settled by the deed of 1824, besides other funds. So that, if this be so, the very fund was re-settled ; and it could not be objected that the husband was not aware of the fact. The one-third thus settled proved to be equal in amount to 1000*l.* The modes in which the funds were settled in 1805 and 1824 were not s

(a) 2 Atk. 521

(c) 18 Ves. 8.

(b) 1 Ves. 501.

different as to prevent the latter from being a satisfaction of the former.

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The prayer of the bill is confined to the settlement of 1805 ; and this carefully, and with a view to ask no other relief. For it appears by the answer of *Thomas*, the father, that his son-in-law, *Mr. Hayes*, received from him all the settled funds in the settlement of 1824, and misapplied them : and although, therefore, the wife and children have an effectual remedy for the breach of trust, yet that would involve *Mr. Hayes* himself. This bill, therefore, appears to be a contrivance to charge the father, and to keep harmless *Mr. Hayes*, who is really the party in default. It was insisted that the very circumstance that the funds had been wasted, gave the wife and children a right to go against the fund settled in 1805 ; but there is no such settled fund remaining in specie : in either view, it is a mere demand of money ; and upon a proper bill for execution of the trusts of the settlement of 1824, an effectual decree can be made, providing for the interests of all parties. This is, in truth, *Mr. Hayes's* bill ; artfully framed so as to excuse himself. I think that the only relief sought by it, is barred by the settlement of 1824, under which no relief is sought ; nor are the necessary parties before the Court for that purpose. I shall, therefore, dismiss this bill with costs, to be paid by the next friend, except as against *Mr. Hayes*, who will bear his own costs.

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A solicitor is not at liberty to deal with his client for a security for a debt due to him by a third person, without giving to his client all the information he possesses connected with his demand, and the nature of the security.

Therefore, where a solicitor took from his client a security on a sum of money charged upon the estate of the principal debtor, for the recovery of which the client was then prosecuting a suit in Equity, and did not disclose to him the circumstances connected with that estate, and particularly that he (the solicitor) had other demands affecting it, a bill to enforce that security was dismissed, with costs.

JOHN JOYCE, the brother of *Henry Joyce*, entitled to one-sixth of a sum of 1500*l.*, charged by marriage settlement of his father, upon the lands of *K* and other estates, of which *Henry Joyce*, under settlement, was seised in fee. In 1811, *Thomas* as solicitor for *John Joyce* and his brothers, *Rich Patrick*, filed a bill in their names against *Henry* to raise their portions. At the time of filing this bill *and Patrick Joyce* were minors. In March, 1812, a receiver was appointed in that suit over all the lands to the charge, except the lands of *Bonnogues* houses in the town of Galway, producing an income of about 60*l.* per annum, which were left in the possession of *Henry Joyce*, for his maintenance. In November 1812, a decree to account was made in that suit; under it the receiver made his report on the 12th of June, 1813, finding that there was due to *John Joyce*, for principal and interest, one-sixth of his share of the charge of 1500*l.*, the sum of 250*l.* and on the 9th of July, 1813, a decree for a sale of the lands, and the other lands, for payment of the sums due, was pronounced.

John Joyce attained his age some time in the year 1812, and shortly afterwards *Thomas Higgins* obtained a decree under the following circumstances, the security of which was the object of the present suit to enforce.

In and previous to the year 1808, *Thomas Higgins* had been the attorney of *Henry Joyce*, who became inc

him in a large sum of money for costs : and the costs having been taxed, *Henry Joyce*, in order to secure the payment thereof, executed his bond to Mr. *Higgins*, in the penal sum of 2595*l.* 4*s.*, with a warrant of attorney to confess judgment; upon which a judgment was, afterwards, in Hilary Term, 1808, entered in the Court of Common Pleas.

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Mr. *Higgins* having become urgent for the payment of his demand, and having threatened to issue execution on his judgment, *Henry Joyce*, on the 31st of January, 1812, applied to the Court of Common Pleas to have the costs re-taxed, upon the allegation that the former taxation had been *ex parte* ; and on the 8th of February he obtained an order that Mr. *Higgins* should furnish to him his several bills of costs, and that the same should be taxed. Upon the re-taxation the amount of the several bills of costs was increased ; and on the 16th of April, 1812, it was ordered by the Court that *Henry Joyce* should forthwith pay to Mr. *Higgins* the full costs of the re-taxation, and such costs as had been added to the original costs on the taxation ; and also the costs of the cause shown against the application of *Henry Joyce*, and of the motion. The costs so ordered to be paid amounted, as Mr. *Higgins* alleged, to the sum of 214*l.* 7*s.* 2*d.* The bill of costs of the re-taxation was not, however, forthcoming ; nor was there evidence in the cause that it had been taxed ; but a copy of a summons to tax the costs, dated the 20th of June, 1812, was produced by Mr. *Higgins*.

Mr. *Higgins* being about to enforce the payment of these costs, Mr. *Hughes*, the father-in-law of *Henry Joyce*, wrote the following letter to him, dated the 5th of June, 1813 :
 “ Mr. King has informed me you were to issue an attach-

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ment against *Henry Joyce* for your taxed costs, which I did not imagine you would do, after our agreement. Sure you cannot say you met with any interruption in bringing *Kilnane* to a sale. Your costs must be the first money to be paid out of the purchase-money ; or, if you like better, you shall have an order from *John Joyce* to receive it out of his child's portion. I beg your answer, which will oblige. *John Joyce* will be here on Thursday, ready to send you the order."

It did not appear whether Mr. *Higgins* returned any answer to that letter. On the 17th of June, 1813, he executed a power of attorney to *J. J.*, to demand the 214*l.* 7*s.* 2 from *Henry Joyce* ; and an affidavit by *J. J.* was produced in which he stated that, on the 24th of June, 1813, he served *Henry Joyce* with a copy of the order of the 16th of April 1812 ; and at the same time, by virtue of the power attorney, which he produced to *Henry Joyce*, demanded from him the sum of 214*l.* 7*s.* 2*d.*, stated in the power to be the taxed costs pursuant to the said order. On the 2nd of July, 1813, it was ordered by the Court, upon the application of Mr. *Higgins*, and upon reading the order of "the 16th of April last," and the affidavit of *J. J.*, and another affidavit, that an attachment should issue against *Henry Joyce*, unless cause. It did not appear whether that conditional order was ever made absolute ; or whether, at the time when payment of the costs was demanded, the bill for costs for the 214*l.* was shown to *Henry Joyce*.

On the 12th of July, 1813, Mr. *Hughes* again wrote to Mr. *Higgins* : " I received your favour, and cannot but agree with you that it was incumbent on you to have your costs secured ; and no person can take it ill of you to do so

For my part, I shall ever acknowledge that, since I got into communication with you for Mr. *Joyce*, no man could behave more like a gentleman ; and I shall only say that I shall take care that you shall have no cause to charge me with a breach of agreement or promise ; and I hope that I will convince you, on the general settlement, that it is my wish that Mr. *Joyce* shall pay your demand without trouble or procrastination. Enclosed I send you Mr. *John Joyce's* letter, empowering you to receive 214*l.* you had against his brother *Henry*, out of his child's portion, if you cannot get it out of the produce of Killenane. This secures you against contingencies. I pray you may acknowledge the receipt of this, directed to me, to the care of *Henry Joyce*, Post-office, Tuam."

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The letter of *John Joyce* to Mr. *Higgins*, enclosed therein, was in these words : " Sir, I do hereby empower and authorize you to receive out of my child's portion, as stated by the Master, the sum of 214*l.* sterling, to pay your costs against my brother, *Henry Joyce*, for which you obtained an attachment against him, in case you do not receive the same out of the sale of Killenane. As soon as the sale is perfected, I shall go to town and perfect any receipt or other power that may be necessary for you."

Upon receipt of these letters, Mr. *Higgins* forbore further proceedings against *Henry Joyce*, for recovery of the 214*l.*

In May, 1815, the lands of Killenane were sold under the decree in the Chancery cause, for the sum of 2310*l.*, which was more than the amount of the charges thereon ; but the purchaser was afterwards, in July, 1815, discharged from

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his purchase, upon the ground that a good title could not be made to him under the decree, the necessary parties not being before the Court.

Mr. *Higgins* was also a creditor of *Henry Joyce*, on foot of several other judgments, some prior and others subsequent in date to the letter of the 12th of July, 1813 ; and, amongst them, on foot of a judgment obtained in Hilary Term, 1825. In that year he issued an *elegit* on the judgment of 1825, and extended the lands of Bonnogues and the houses in Galway, as and for a moiety of all the lands of *Henry Joyce* ; and continued in possession thereof, under the *elegit*, until 1833. In 1834 an account was settled between him and *Henry Joyce*, on foot of his demand, and a balance was found to be due to Mr. *Higgins* ; and by indenture of the 25th of October, 1834, *Henry Joyce* assigned Bonnogues and the houses in Galway to a trustee for Mr. *Higgins*, for the term of ninety-nine years, upon trusts for payment of his demands : and the trustee had ever since continued in possession thereof. The settled account was not produced.

In 1825 Mr. *Higgins* ceased to be the solicitor of *John Joyce* ; and in November of that year, a supplemental bill was filed against the proper parties, to remedy the defect in the original suit ; and in January, 1843, a decree for a sale of the lands was pronounced in the supplemental suit. By that decree a sum of 300*l.*, part of the sum reported due to *John Joyce*, was ordered to be impounded in Court for one fortnight, for the purpose of enabling Mr. *Higgins* to take such proceedings as he might be advised, to establish his rights under the letter of July, 1813, against the share of *John Joyce* ; and thereupon he filed the present bill against *John Joyce* and *Henry Joyce*, praying that the letter of the 12th of

July, 1813, might be decreed to have created a valid charge upon the sum due to *John Joyce*, on foot of his share of the charge of 1500*l.*, to the extent of the sum of 214*l.*, and interest thereon from the date of said letter; and for an account of the sum due on foot thereof; and for payment out of the share of *John Joyce*.

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By his answer, *John Joyce* denied that he had authorized *James Hughes* to write the letter of the 5th of June, 1813: and said that in July, 1813, he was altogether destitute, and *Henry Joyce* being then on a visit at the house of *James Hughes*, he, *John Joyce*, went to him in the hope of obtaining some assistance; and that at the request and dictation of *James Hughes*, he wrote the letter of 12th July, 1813, being informed that it would facilitate arrangements then pending for a sale of part of the estate of *Henry Joyce*, out of the purchase-money of which, he was to be paid his demand; and he denied that any consideration was given to him for writing said letter; and said that at that time he had no other professional adviser than Mr. *Higgins*.

Mr. Sergeant *Warren*, Mr. *Monahan*, and Mr. *P. Blake*, for the plaintiff. Argument.

Mr. *Moore*, Mr. *W. Brooke*, and Mr. *C. Andrews*, for *John Joyce*.

Hunter v. Atkins(a); *Hall v. Hallet*(b); *Lewis v. Morgan*(c); *Lawless v. Mansfield*(d).

(a) Coop. Rep. temp. Brougham,
668; S. C. 3 M. & K. 113.

(b) 1 Cox, 234.

(c) 5 Pri. 42.

(d) 1 Dru. & War. 557.

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Judgment.

THE LORD CHANCELLOR :—

This is a case of some importance as to the principle involved in it. The younger children of the late Mr. *Joy* of whom *John Joyce* was one, were entitled amongst them to a sum of 1500*l.*, payable out of the estate in question and subject thereto, *Henry Joyce* was entitled to the inheritance. A bill had been filed during the minority of *John Joyce* to raise the portions; he came of age in 1812, and had no other provision than his share of the portion, which amounted to 250*l.* and interest. In 1813 a report was made in that suit, ascertaining the shares of the portion to which the several younger children were entitled. After the lapse of several years, certain proceedings, to which it is not necessary I should refer, were taken for a sale of the estate. The present plaintiff, Mr. *Higgins*, was the attorney for the plaintiffs in that family suit, and amongst them, for *John Joyce*, the defendant in this suit; and it appears that he was also, during the prosecution of that suit and previous thereto, attorney for *Henry Joyce* in many other transactions; and that, in the course of that employment of him by *Henry Joyce*, costs to a large amount had been incurred. They were taxed, and a bond and judgment were obtained for them. At last disputes arose between *Higgins* and *Henry Joyce*, not with reference to the cause or the portions, but with respect to the taxation of the costs in the other matters. The result was that considerable additional costs were incurred in re-taxing those costs; and *Henry Joyce* was ordered to pay the costs of the re-taxation, amounting about 214*l.*; for the original costs, instead of being reduced, were increased by a small amount. *John Joyce* had nothing to do with these proceedings; they did not relate to a

property of his. He was wholly without any provision but this small portion, and was so reduced in his circumstances, that shortly afterwards he enlisted in the East India Company's service, and did not return to Ireland until 1826. It now turns out that *Higgins* was a creditor by judgment of *Henry Joyce* to a large amount : some of the judgments he had obtained for his own demands ; and others he had bought up from creditors of *Henry Joyce*. In these circumstances, having a judgment for the costs so re-taxed, but doubting whether the costs of the re-taxation could be recovered under it, he became desirous to obtain some security for payment of the costs of re-taxation. He did not want any new security to enable him to take the person of *Henry Joyce* in execution ; but what he desired was security for payment of the costs of re-taxation.

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I cannot permit the plaintiff to say, if he be entitled to enforce his present demand, that he has neglected to preserve the evidence of it. He was placed in a peculiar situation. He had obtained a security from a young man, as surety for another ; he was therefore bound to keep all the documents connected with the transaction, in order to enable the Court to judge of its validity. But I have only the papers of one side ; for everything on the part of *Higgins* has been mislaid. The original bill of costs, which he was bound to prepare to show to the party and leave with the officer, is not produced. The taxation of the costs of re-taxation is not forthcoming, and that document ought to be in his own possession. He writes letters and receives answers ; yet none of the letters written by him, or copies of them, have been produced. I am called on to enforce this agreement, not upon the whole correspondence which constitutes the agreement, but merely upon letters written by the party

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against whom the bill is filed, and by a third person to the plaintiff. I never have seen a case in which the evidence was more defective;—a case in which a solicitor has induced a young man, just come of age, to become security for debt not his own; and has neglected to keep copies of his own letters, or to preserve the evidence of the real nature of the transaction.

The case appears to me to stand thus: I think that the conditional order for the attachment was, upon the evidence, irregular; for it was issued without any proof that, when the demand was made, the bill of costs was shown to *Henry Joyce*; and it is stated by the officer of the Court, in his evidence, that at that time it was the practice to show the bill of costs when the demand was made; and no attempt has been made to deny that such was the practice. I must, therefore, take it, that the conditional order was irregular in that respect, and also in another point; for the order for the taxation of the bill of costs having been made in April, 1812, and the conditional order for the attachment in July, 1813, and it being necessary to the validity of that order that there should be a proceeding within a year of the former order, the second order refers to the former as bearing date in April last, which, on the face of it, made the second order regular, whereas in fact it was irregular. But, supposing that the conditional order was regular, it ought to have been followed by an absolute order.

Then what are the merits of the case? I have no answer to the letter of the 5th of June, 1814, from *Hughes*, the agent of *Henry Joyce*, to *Higgins*. That letter was well calculated to call on the plaintiff to act with great caution, the security not having been offered by the defendant him-

self, and all his dependence being on this small portion, and it not being stated that he was to receive any consideration for giving it. I am bound by the evidence to consider that the plaintiff wholly rejected the proposition contained in it ; for I find that, notwithstanding the letter, he, on the 17th of June, 1813, about a fortnight afterwards, executed a power of attorney to make a demand of the costs, in order thereon to ground an application for an attachment ; and I have the affidavit of the person making that demand, dated the 26th of June ; and lastly, there is the conditional order for an attachment, dated the 2nd of July. It is, therefore, manifest, that the plaintiff repudiated the proposition altogether. No answer to that letter is produced : but there is a letter of the 12th July, 1813, from *Hughes* to *Higgins*, in which he says : “ Enclosed I send you Mr. *John Joyce’s* letter, empowering you to receive 214*l.* you had against his brother, *Henry*, out of his child’s portion, if you cannot get it out of the produce of Killenane. This secures you against contingencies. I pray you may acknowledge the receipt of this, directed to me, to the care of *Henry Joyce*, Post-office, Tuam.” That letter shows that *Henry Joyce* was a party to this transaction. Again, there must have been a copy of *John Joyce’s* letter made for him ; he evidently was an ignorant person ; his letter is mis-spelled throughout. I have no doubt that his letter was a copy from a document placed before him. Then this bill is filed, after the lapse of many years, to enforce this as an agreement to charge *John Joyce’s* portion with the debt of *Henry Joyce*.

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I must first inquire whether this is a transaction which the law will sustain. I do not say that a solicitor may not deal with a family or father and son for a security for costs

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actually due ; but in most of the cases where debts of the father have been cast on the son, it was matter of family arrangement, upon the occasion of a provision being made for the son. This is the case of two brothers, the elder of whom had not performed a single duty he owed towards his younger brother. He had not paid him any interest on his portion for six years, though he had no other provision ; and he had wholly neglected his education. But suppose *Higgins* was competent to deal with *John Joyce*, and obtain from him a security for the debt of his brother, a matter with which he had no concern and from which he derived no benefit, and the result of which was to deprive him of his small property ; this, at least, I am clear of, that he, being the attorney of *John Joyce*, and, as such, bound to prosecute the then pending suit for him, was bound to give him all the information which would enable so young a person to form a fair judgment of the nature of the transaction he was about to enter into. Did he do so ? *John Joyce* was brought, as a mere schoolboy, to write a copy of a document furnished to him, having himself no knowledge or information on the subject. Is it to be allowed to a solicitor, concerned for minors in a cause, to obtain for a collateral purpose the whole portion of one of the late minors, without any consideration given to, or communication had with him ? Who took care of the interests of *John Joyce* in this transaction ? The document shows, on the face of it, that *John Joyce* knew nothing about the nature of the security he was giving ; and we now know that it was doubtful at that very moment, and was so considered by *Higgins* himself, whether *Higgins* had an available security for this debt on the estate of *Henry Joyce*. The security given by *John Joyce* was to be available in case *Higgins* did not receive his demand out of the proceeds of the sale of *Hen*

Joyce's estate. I dare say he was told that his giving this security was a matter of no importance: but I lay down this principle, that *Higgins* was not at liberty to take this security from *John Joyce* without acquainting him with all the circumstances of the estate, the incumbrances that were upon it, especially his own, and without making him perfectly acquainted with the nature of the document he was about to execute. It is in proof that, before this letter of *John Joyce* was written, *Higgins* was purchasing up incumbrances affecting the estate of *Henry Joyce*. Did he communicate to *John Joyce* the existence of these securities, and that he meant to enforce them against the estate, and leave the portion as the only security for his demand for the costs? No such thing. In 1825, when this transaction took place, the receiver in the cause had not been extended to a small part of the estate producing about 60*l.* a year. I do not quarrel with that; on the contrary I think it right, where it can be done, to leave to the owner of the estate some part of it for his own support; but I find fault with this, that after *Higgins* had obtained this security from *John Joyce*, he, in order to obtain payment of other debts incurred by *Henry Joyce*, subsequent to this transaction, procured from him the rents of that part of the estate over which the receiver had not been extended. How is that to be defended? Those rents were properly applicable to the payment of the portion; and if they had been so applied, they would have increased the primary fund for payment of the costs. Everything which *Higgins* received on the foot of *puisne* securities was so much deducted from the fund for payment of the costs. The conduct of *Higgins* has been such as to deprive him of the benefit of his security against *John Joyce*; he ought not to have touched any part of the fund for

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payment of a subsequent demand, and keep his prior on foot as against *John Joyce*. Again, it appears counts were settled in 1834, between *Higgins* and *Joyce*; but no evidence of what they were has been. I am bound to suppose that those accounts included 214*l.* for costs, as they ought to have done; and that *Higgins* took care, out of the rents of the reserved part of the estate, to pay himself this demand. If the amount does not include the 214*l.*, yet I think the plaintiff was at liberty to divert those rents from that which was their proper destination.

Upon the whole case, the evidence does not warrant in decreeing for the plaintiff; and upon the principle of *Higgins*, as solicitor for *John Joyce*, was not at liberty to take from him a security for the debt of his brother, without informing him of all that related to the property, and the nature of his own securities which affected the inheritance. I must dismiss this bill, and, as against *John Joyce*, award costs. I have not said, nor do I mean to lay down a general proposition, that a solicitor is not at liberty to deal with a client for a security for a third person; but he must do so fairly and with full information.

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BY articles executed in contemplation of a marriage between *William Hamilton*, jun., and *Anne M' Math*, bearing date the 30th of April, 1794, and made between *William Hamilton*, the elder, of Lesquil, farmer, of the first part; *William Hamilton*, jun., his fourth son, of the second part; *Anne M' Math*, of the third part; and *Andrew M' Math*, of Aughdreena, farmer, her father, of the fourth part; *William Hamilton*, the elder, in order to make a provision for his son, *William Hamilton*, jun., in case the marriage should take effect, and in consideration of the marriage and of the marriage portion agreed to be paid, as after mentioned, assigned to *William Hamilton*, jun., certain leasehold lands and premises, subject to the payment of the rent reserved; and also, by his bond to his said son, secured to him the payment of the sum of 113*l.* 15*s.* on the day next after the solemnization of the marriage. And *Andrew M' Math*, in consideration of the intended marriage, and as a marriage portion with his daughter, agreed to give with her the sum of 200*l.*: that is to say, 100*l.* thereof, payable the day after the marriage; and the remaining sum of 100*l.* payable, with interest, one year after the birth of the first child of the intended marriage. And it was agreed that in case *Anne M' Math* should die in the life-time of her intended husband, without issue, then the sum of 100*l.*, part of the 200*l.*, should go and revert back to *Andrew M' Math*. And *William Hamilton*, jun., covenanted with *Andrew M' Math*, that in case he should die in the life-time of *Anne M' Math*, his intended wife, without issue by her,

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By marriage articles, the intended husband covenanted that in case he should die in the life-time of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his life-time, contrary to the true intent and meaning of the articles. There was no issue of the marriage; and the husband died, leaving his wife surviving.

She is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance.

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that then and in such case, the said *Anne M' Math* should be entitled to one full half of what property, real or personal, of what kind soever, the said *William* should die seised or possessed of at the time of his death ; and that in preference to any creditor or creditors of the said *William* or to any deed or will which the said *William* might make or execute in his life-time, contrary to the true intent and meaning of the articles.

William Hamilton, jun., died in 1844, seised and possessed of several fee-simple, freehold and leasehold estates, and of personal property ; and leaving his wife his surviving. There never had been any issue of the marriage. By his will, dated the 16th of December, 1843 he devised and bequeathed his real and personal property amongst his nephews and other relations, subject, as to part of it, to an annuity of 500*l.* per annum for his wife, during her life ; and he also gave to her the use of his dwelling house, furniture and plate, during her life.

Mrs. *Hamilton* elected to take against the will ; and filed the present bill praying that she might be declared entitled to the benefit of the articles of 1794, and that same might be carried into execution ; and for an account of the real and personal estate of *William Hamilton*, jun., of which he died seised of, possessed or entitled to ; and that she might be declared entitled to a clear moiety thereof, and to dowry out of the other moiety of her husband's real estate.

Argument.

Mr. Sergeant *Warren*, Mr. *W. Brooke*, and Mr. *La* for the plaintiff.

Mr. *Bennett*, Mr. *Moore*, Mr. *Gayer*, and Mr. *R Moore*, for the several devisees of the real estate.

Though the provision made by the articles of 1794, for the plaintiff, is not expressed to be for her jointure, it is manifest that it was intended to be such; and it being apparent that the moiety of the real and personal estate thereby given to her was intended to be her only provision in case she should survive her husband, it is a satisfaction of her claim to dower; *Vizard v. Longdale*(a); which was approved of by Sir A. Hart, in *Power v. Sheil*(b); *Lord Buckinghamshire v. Drury*(c). In *Gartshore v. Chalie*(d) the husband, after making some provision for his wife in case she should survive him, covenanted, in consideration of the marriage, that his heirs, executors, &c., should, within six months after his decease, convey, pay and assign to her a certain proportion of all such real and personal estate as he should be seised or possessed of, or entitled to at his decease; and Lord Eldon laid down the principle that if, upon the whole instrument, it appeared that the provision made thereby was intended to be the provision which, in every view, the wife was intended to have, as between her and the heirs, executors, and administrators of the husband, it was a bar to her claim to dower. It is a fair inference that, when the wife stipulated for more than the law would have given her, viz., one-half instead of one-third, it was to be in lieu of that which the law, independently of contract, would have given her: or, if the provision by the articles of 1794, is not an absolute bar to dower (for it is to arise in one event only), yet the dower must be taken to be a part satisfaction of the wife's claim under articles. *Berminham v. Kirwan*(e), and *Wilcocks v. Wilcocks*(f), were referred to.

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(a) Cited in *Tinney v. Tinney*,

3 Atk. 8.

(b) 1 Mol. 296.

(c) 2 Eden. 60.

(d) 10 Ves. 1.

(e) 2 Sch. & Lef. 444.

(f) 2 Vern. 558.

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Mr. *W. Brooke*, in reply.

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This is not a provision in lieu of dower. It does not appear that dower was in the contemplation of the parties when the articles were executed. A provision of dower should be a provision in every event, and this is to arise only in the event of the husband leaving issue: and though a woman, if adult, may contract a contingency in lieu of dower, the intention should be clearly expressed. *Vizard v. Longdale* decided on the effect of the words, "for her livelihood maintenance," in the bond: but in *Couch v. Strickland* the wife was held to be entitled to dower, notwithstanding a provision similar in its nature to the present one. The dower can be considered as a part performance of a covenant in the articles of 1794; for dower is not a provision of the husband, but of the law. *Case of Mason's will*, cited in *Lee v. D'Aranda*(b).

Judgment. THE LORD CHANCELLOR:—

This case depends upon the construction of the articles. It is a mere question of intention, to be collected from the provisions of the articles. I quite agree with *Vizard v. Longdale*(c) is not now to be disputed. It does not, however, decide a great deal: for a jointure means a provision for the wife; and in that case it was declared, that the wife was to be for her livelihood and maintenance. Now a jointure is a provision for the livelihood and

(a) 4 Ves. 391.

(b) 1 Ves. 2.

(c) Cited in *Tinney v.*

3 Atk. 8.

tenance of the wife. The Master of the Rolls thought otherwise; but the Chancellor reversed his decree, and held that the wife took the bond in the nature of a jointure.

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In order to exclude the right of the wife to dower, there must be either an express declaration, or such a plain intention, to be collected from the whole instrument, as will satisfy the Court that, in excluding the claim to dower, it does not incur the danger of going contrary to the intention of the parties to the contract. It is very probable (though I cannot assume it as a fact), that at the time of the marriage, the husband had no real, and but a small personal estate. The parties were dealing about small properties; the husband was to have 100*l.* as the portion of his wife, and another 100*l.* if there should be issue of the marriage; and if the wife died in the life-time of her husband, without issue, then the second 100*l.* was to go to the wife's father.

The parties contemplated both the case of the wife dying in the life-time of her husband, and of the husband dying in the life-time of the wife; but both events were contemplated under the same aspect, namely, the default of issue. No provision was made by the articles for the issue; they are left to be provided for by law. The framers of the articles assumed that, if there should be issue, they would be provided for out of the estates of their parents.

The covenant by the husband is most naked in its form. He covenants with *Andrew M'Math*, that in case he should die in the life-time of *Anne M'Math*, his intended wife, without issue by her, in such case, *Anne M'Math* should be entitled to one full half of what property, real or personal, of what kind soever, he should die seised or possessed of at the time of his death; and that in preference to any creditor or creditors of his, or to any deed or will

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which he might make or execute in his life-time, contrary to the true intent of the articles.

Now, independently of the question of dower, this provision, according to the authorities, which would be the entire disposition of all the real and personal estate of the husband in his own power during his life-time, provided he disposed of it against himself. This, therefore, is a provision to operate in a contingent event only, upon such property only as he *bonâ fide* should possess at the time of his death. There is no intention, apparent or to be inferred from the articles, to deprive the wife of her dower or thirds in the event not expressed, viz. there being issue of the marriage. What then is the natural construction of these articles? Do they mean that there shall be, in the case provided for, an equal division of the property between the wife and the representatives of the husband: or that the wife shall have all the rights which the law, independently of the contract, would give her in that event; and in addition, that she shall have, under the contract, the moiety of the real and personal estate. The latter construction would be against the meaning of the contract, which is, that, notwithstanding the articles, the husband might dispose of any part of his real or personal estate, during his life, as he thought proper. If the wife were to have dower, the husband could not dispose of his real estate as against her, discharged of her right to dower; whereas it is plain that the intention was, that the wife was to have nothing but one moiety of the real estate the husband was seised or possessed of at the time of his death. Observe what would happen were this otherwise. Suppose the husband had sold an estate of which he was seised in fee, for its full value, and thereby increased

amount of his personal estate, the wife, on his decease, would, according to that construction, be entitled to an equal moiety of the personal estate under the contract; and she would also be entitled to go against the purchaser of the real estate, to recover her dower out of it; the consequence of which would be, that the purchaser would resort to the personal estate for compensation. Was that the intention of the parties? I think it clearly was not. Again, the wife is dowerable of all the lands of which her husband was seized in fee; and she is entitled to have her one-third set out by metes and bounds. Was it intended that she should take one-third of the fee simple lands for her dower, and one-half of the residue under the contract? I think it is impossible to hold that; and yet that is the position which is contended for. No one can be more unwilling than I am to spell out an intention to exclude a woman of her right to dower; the authorities do not permit it, and I do not desire to go one step beyond what has been decided. I shall make the decree I am about to pronounce, solely because it is my clear opinion that the whole context of the covenant authorizes me to say that the provision made thereby is, in the given event, a substitution for dower.

Again, there is no act remaining to be done: the covenant is only, that she shall be entitled to a moiety of the real and personal estate of which he shall die seized or possessed; and therefore, though *Wilcocks v. Wilcocks*(a), and that class of cases, does not directly apply to the present, the case is open to this view, that she is entitled to so much under the contract as, with the one-third which the law gives her, will make up the one-half to which she

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(a) 2 Vern. 558.

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is entitled. Is it not a performance of the covenant w
 she becomes entitled, partly by operation of the rule of
 and partly by contract, to one-half of his real and pers
 estate ? As to her claim to a distributive share of the
 sonalty, it is excluded ; for by the articles she is to take
 half, free from the debts of her husband.

I think it is, upon the whole, plain, that in the ev
 of there being no children, the husband and wife w
 to divide the whole of the property equally between the
 and that was to be her whole provision. I should be so
 if it were supposed that I intend to go beyond the auth
 ties upon this subject. I believe that I am justified
 them in making the declaration, that the plaintiff is entit
 to one-half of the real and personal estate of which
 husband died seised or possessed ; but not to dower, or
 a distributive share of the personalty.

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HEENAN v. BERRY.

THE bill in this cause was filed in 1839, to foreclose a mortgage affecting the lands of Clonabane, otherwise Dovegrove, and other lands: and upon the report of the Master, made pursuant to the decree to account, the following matters appeared:—

Charles Berry, being entitled to the lands of Clonabane, under a lease for lives renewable for ever, by indenture of the 4th of July, 1795, covenanted that he would, immediately after the solemnization of his then intended marriage with *Mary Cox*, release all his estate and interest in the said lands to trustees, upon trust for himself for his life, with divers limitations over; and upon this further trust, that the trustees, at any time after the celebration of the intended marriage, at his request, should raise out of the

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F. was indebted to *C.* in 800*l.*; to secure which, in 1814, he granted to *C.* an annuity or rent of 100*l.*, to be issuing out of the lands of Dovegrove (held by *F.* under a lease from *C.*); *habendum* until thereby the 800*l.* and interest was paid: and *F.* covenanted to pay the annuity. In 1815 *C.* assigned the sum of 798*l.* (being the money then due on foot of the 800*l.*), and the annuity, to *H.*, and covenanted

that the annuity should be regularly paid: and, being entitled to a sum of 2000*l.* charged on lands of which he was himself tenant for life, he, as a further security, assigned 800*l.*, part of the 2000*l.*, to a trustee, upon trust, in case the annuity should be unpaid for forty-one days, then, from time to time, to call in and receive such parts of the 2000*l.* as should be sufficient to satisfy the arrears, and apply same in payment thereof; and, after payment thereof, in trust for *C.*

In 1816, the annuity was unpaid for more than forty-one days; but payments were made on foot of it, up to October, 1821.

In 1820, *C.* evicted the lands of Dovegrove, for non-payment of rent; and died in 1824.

Under a decree to take an account of incumbrances affecting the lands charged with the 2000*l.*, made in a suit instituted in 1839, the Master reported that the principal money which, in October, 1821, was due on foot of the 798*l.*, and to secure which the 800*l.* had been assigned, was still due; and that the residue of the 2000*l.*, after payment of that sum, was due to the personal representative of *C.*

Upon an exception taken by the personal representative of *C.*, *Held*, that the demand of *H.* was not barred by the 3 & 4 Will. IV. c. 27, s. 40.

The trust created by the deed of 1815 is a continuing trust, not to be executed once for all; and a present right to receive the 800*l.*, within the meaning of the 3 & 4 Will. IV. c. 27, s. 40, did not accrue upon the non-payment of the annuity for forty-one days.

A person entitled to a sum of money charged upon land assigned it to trustees, in trust to secure the payment of a debt; and, after payment thereof, in trust for himself. He cannot, as against his creditor, insist that the trust is barred by the Statute of Limitations.

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estate, by sale or mortgage, the sum of 2000*l.*, to be paid to and disposed of by him according to his will and pleasure.

The marriage was celebrated; and by indenture of the 19th of May, 1798, *Charles Berry* conveyed the lands to Sir *Lawrence Parsons* and *Richard Hetherington*, upon the trusts contained in the indenture of 1795.

In June, 1802, Sir *Lawrence Parsons* and *R. Hetherington*, by the direction of *Charles Berry*, and in consideration of 900*l.* paid by *Martha Cox*, to one *Thomas Michell* at the request of *Charles Berry*, and in order to secure the repayment thereof, granted and released unto *Martha Cox*, her heirs, executors, and administrators, &c. the aforesaid lands, subject to redemption, upon payment of the said sum of 900*l.*, with interest.

Martha Cox died, and *Elizabeth Smith* became her personal representative; and the Master reported that there was due to her the principal sum of 900*l.*, and interest thereon for six years prior to the filing of the bill.

By indenture of lease and release, of the 29th of November, 1805, *Charles Berry* demised to his brother, *Frederick Berry*, part of the lands of Clonabane, for three lives or thirty-one years: and, by a deed of annuity, dated the 6th of June, 1814, made between *Frederick Berry*, of the one part, and *Charles Berry*, of the other part, after reciting that *Frederick Berry* was then indebted to *Charles Berry* in 800*l.*, and that *Charles Berry* had agreed to accept payment thereof at the rate of 100*l.* per year, until the 800*l.* and interest should be paid off, *Frederick Berry* granted

Charles Berry, his executors, &c., an annuity or yearly rent-charge of 100*l.*, to be issuing out of the lands demised to him; to hold for the term of ten years, or until the 800*l.* and interest should be paid: and *Frederick Berry* covenanted to pay the annuity.

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By indenture of the 23rd of February, 1815, between *Charles Berry*, of the first part; *W. Hobart*, of the second part; and *R. Buchanan*, of the third part: after reciting that there was then due on foot of the before-mentioned sum of 800*l.* and interest, the sum of 798*l.*; *Charles Berry* in consideration of the sum of 500*l.*, assigned to *W. Hobart* the said sum of 798*l.*, and the interest due thereon, and the annuity of 100*l.*, for the residue of the term of ten years, or until the 798*l.*, with interest, should be paid: and he covenanted with *W. Hobart* that the annuity of 100*l.* a year should be regularly paid. And, as a further security for the payment of the annuity, after reciting that he was entitled to the sum of 2000*l.* charged upon the lands of Clonabane, *Charles Berry* assigned to *R. Buchanan* the sum of 800*l.*, part of the said sum of 2000*l.*, in trust to permit and suffer *Charles Berry*, his executors, &c., to receive the interest and proceeds of the 2000*l.*(a), until default should be made in payment of the annuity or rent-charge, or some part thereof; and in case the annuity or rent-charge, or any part thereof, should be unpaid for the space of forty-one days after any of the days therein appointed for the payment thereof, then, from time to time, to call in and receive such part or parts of the 2000*l.*(a) as should be sufficient to satisfy the said annuity or rent-charge, or so much thereof as should be in arrear, together with costs; and to

(a) So in the brief.

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apply such moneys in payment and satisfaction thereof: ~~and~~ when and so soon as the said sum of 798*l.*, and the interest thereon, should, by means of said annuity or otherwise, and all costs and charges, be fully paid off and discharged, then upon trust to transfer said sum of 800*l.*, and the interest thereof, or so much thereof as should not be called in and applied to the purposes aforesaid, to *Charles Berry*, his executors, &c.

Frederick Berry's interest in the lands of Clonabane, under the lease of 1805, continued up to December, 1820, when *Charles Berry* took possession of the lands under a *habere* issued by him on a judgment in ejectment for non-payment of rent.

W. Hobart died in 1829; and *Elizabeth Buchanan*, ~~a~~ defendant in this suit, was his personal representative.

The Master, pursuant to the direction in the decree ~~to~~ take an account of prior incumbrances, reported, that there was due to *Elizabeth Buchanan*, as such personal representative, on foot of the sum of 798*l.*, to secure which the said sum of 800*l.* was assigned as aforesaid, for principal money, the sum of 415*l.* 14*s.* 4*d.* present currency; *Elizabeth Buchanan* having admitted that the principal sum of 798*l.* was, on the 11th of October, 1821, reduced to said sum: and that there was due for interest thereon, from the 11th of October, 1821, to the date of the report (5th of January, 1845), the sum of 579*l.* 10*s.* 9*d.*

He further reported that the residue, if any, which should remain due of the 2000*l.*, after paying to *Elizabeth Smith* and *Elizabeth Buchanan* the sums reported due to them, was

due and payable to the defendant, *John Berry*, as the personal representative of *Charles Berry*, deceased, who had died in July, 1824.

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John Berry excepted to the report : (1), because the Master should have found that the claim or demand of *Elizabeth Buchanan* was wholly barred by the Statutes of Limitation, or one of them; and ought not to have found that any sum whatever was due to her on foot of her said demand : (2), because the Master ought not to have found that any sum whatever was due for interest on the sum of 415*l.* 14*s.* 4*d.* : (3), because he ought to have found that *Elizabeth Buchanan* was entitled to interest on the sum of 415*l.* 14*s.* 4*d.*, for six years only, previously to the filing of her charge; or, at all events, for six years only, previously to the filing of the bill in this cause.

In support of the first exception, evidence was given that, in 1816, the annuity had been in arrear for more than forty-one days.

Mr. Sergeant *Warren* and Mr. *Rogers*, for *John Berry*.

Argument.

The question must be considered as if *E. Buchanan* were now suing to raise the 800*l.* In 1816 a present right to receive that money accrued: the whole 2000*l.* was then raisable; for the 800*l.* could not have been raised without also raising the 2000*l.* Nothing has since occurred to take the case out of the operation of the 3 & 4 Will. IV. c, 27, s. 40. At least, the Statute operates as a bar to the claim of *E. Buchanan* to so much of the 800*l.* as, according to the trust, ought to have been raised more than twenty years before the filing of the bill.

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Argument.

The charge of 2000*l.* was only an auxiliary fund to secure the payment of the annuity; the lands were the primary security for its payment: and *White v. Hillacre* leads to the inference that payment on foot of the primary security will not keep the demand alive against the fund secondarily liable. So, in *Hughes v. Kelly*(*b*) it was held that no more than six years' arrears of interest could be recovered out of land, though there was a covenant for the payment of the money. If this be considered as a proceeding to recover the arrears of the annuity, as it is, then the demand for more than six years' arrears is barred by the 2 & 3 Will. IV., c. 27, s. 42.

Mr. *Brewster*, and Mr. *T. Fitzgerald*, for *Elizabeth Buchanan*.

The bar of the Statute is not set up by the person entitled to the lands out of which the 2000*l.* is to be raised nor could it, under the circumstances of this case. It is admitted that the whole 2000*l.* must be raised; the only question is, who is entitled to it? As the annuity was paid up to 1821, the operation of the 3 & 4 Will. IV. c. 27, s. 40 even if it were applicable to this case, is excluded. *Du Vigie v. Lee*(*c*) is opposed to *Hughes v. Kelly*. Sir *J. Wigram* V.C., there held that a mortgagee of land, whose mortgage debt and interest was secured by a bond or covenant, was entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt, within twenty years before the institution of the suit.

(a) 3 Y. & C. 597.

(c) 2 Ha. 326.

(b) 3 Dru. & War. 482.

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Judgment.

THE LORD CHANCELLOR :—

I am of opinion that the payment of the principal sum is not barred by the Statute of Limitations. This was an auxiliary fund for payment of the annuity. The party to whom the annuity belonged, by his own act, evicted the primary fund, and so made the auxiliary fund the only one for payment of this demand. From its nature, it was not easy to render it available. It was a charge of 2000*l.* upon an estate of which the grantor was himself tenant for life. He charged this fund with other incumbrances; and a *puisne* incumbrancer on the estate, having filed a bill to have his securities made available, suggested that there were incumbrancers whose charges affected this fund; and he made them, including Mrs. *Buchanan*, who was entitled to the charge in question, parties to his suit. The Court decreed an account of incumbrances prior and contemporaneous with the plaintiff's.

It is said that this demand is barred by the Statute of Limitations. It is clear that the trust did not authorize the raising of the whole sum at any given period; it was a continuing trust: therefore the question does not arise, for the Master has only taken the account from 1821, and the bill was filed in 1839. The bill, therefore, saved the Statute. The practice in this country is different from that in England; for here the course is to decree a sale, and therefore to take an account of all prior incumbrances. This bill prays an account of prior incumbrances; and, therefore, it saves the case from the bar of the Statute. Independently of that, there is the question of trust. *Charles Berry* charged this 2000*l.* with several sums; and, amongst

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Judgment.

others, assigned part of it to a trustee for the present applicant, and declared that the trustee should, out of the charge, raise, from time to time, as much money as would be necessary for the payment of the annuity : and then, in a suit to raise the whole 2000*l.*, the personal representative of the party entitled to that sum, subject to the charge he had created on it, insists that the entire 2000*l.* shall be raised and paid to him, discharged of the sum his testator had charged on it. But *Charles Berry* has declared that the trustee shall be a trustee of 800*l.* part of the 2000*l.* in trust for the applicant ; how then can he or his representative insist that he himself is entitled to that of which he has declared the trust to be for this particular assignee. The exception must, therefore, be overruled.

After argument of the second and third exceptions, the parties compromised the matter, by *Elizabeth Buck* consenting to take six years' interest on her demand.

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MARA v. MANNING.

April 18,
21, 22.

ROSE ANNA, the wife of *Lawrence Mara*, was one of the children of *Thomas Gaffney*, who died intestate.

In 1822, *Lawrence Mara* and *Rose Anna*, his wife, filed a bill for an account of the personal estate of *Thomas Gaffney*, and for their distributive share thereof; and a decree in that cause, made on the 5th of August, 1826, was referred to the Master to take the usual account and to approve of a proper settlement to be made of the property to which *Rose Anna Mara* was entitled. The Master having made his report, a final decree was pronounced on the 14th of November, 1826, whereby it was, among other things, ordered and decreed, that *Lawrence Mara* should receive, out of the funds to which *Rose Anna Mara* in her right were entitled, the sum of money on his effecting an insurance on his life for the like sum, and that, after payment of the said sum of 500*l.*, and on any other sum of money therein mentioned, the residue of the money reported due to *Lawrence Mara* and *Rose Anna*, his wife, and the policy of insurance, should be paid over and assigned to the trustees of the settlement to be executed for *Lawrence Mara*, pursuant to the order of the Court, deducting the costs of said settlement), to be held by the trustees upon the trusts mentioned in said settlement.

A money fund belonging to the wife, was vested in trustees, upon trust to pay the interest to the husband for his life, or until he should take the benefit of any Act for the relief of Insolvent Debtors: and after his decease, or obtaining the benefit of such Act, upon trust to pay the interest to the wife for her life; the same to be paid to her, in case of the insolvency of the husband, to her separate use; and after her decease, in trust for the issue.

The trustees, at the instance of the wife, committed a breach of trust by lending part of the trust funds to the husband; who afterwards was discharged as an insolvent.

Upon a bill filed by the wife and her children to make the trustees answerable for the breach of trust:—*Held*, that the contingent interest of the wife, for her separate use, was not bound to make good the money advanced by them at her request.

—Whether her life interest, after the decease of her husband, was so bound.

—That if the discharge of the husband, as an insolvent, had been concerted with the wife, in order thereby to entitle her to a present interest in the trust funds, the equity of the trustees against her husband, the trustees would be entitled to the same as against her as against the husband.

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v.
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By indenture, dated the 13th of July, 1828, made between *Lawrence Mara* and *Rose Anna*, his wife, of the one part, and *Martin D. Manning* and *Robert L. Hyde*, of the other part; and after reciting the decree; that *Rose Anna* and *Lawrence Mara's* share of the funds in the cause amounted to 2647*l.*; and that, after deducting therefrom the said sum of 500*l.*, and the other sum of money therein mentioned, there remained a sum of 2062*l.* to be transferred to the trustees; and that *Lawrence Mara* had effected a policy of insurance on his life for the sum of 500*l.*; *Lawrence Mara* and *Rose Anna*, his wife, in pursuance of the decree, assigned to *Martin D. Manning* and *Robert L. Hyde* the said sum of 2062*l.*, upon trust, with all convenient speed, to lay out and invest same in the purchase of Government stock, or in some other public or real or landed valuable security; and upon this further trust that they should, in the first place, out of the interest, dividends, and annual proceeds thereof, pay all such annual payments or other sums as should, from time to time, be necessary to keep up the said policy of insurance, during such time as it should be necessary to keep up the same: and after payment thereof, upon trust to pay the remainder of the interest, dividends, and annual proceeds, unto *Lawrence Mara* and his assigns, for his life, or until he should commit an act of bankruptcy whereon a commission should issue, or until he should take the benefit of any Statute then or thereafter to be in force for the relief of Insolvent Debtors, or until he should make an assignment of his property for the benefit of his creditors or should make any composition with his creditors, for the payment of his debts, whichever should first happen: and after the decease of *Lawrence Mara*, or his committing an act of bankruptcy whereon a commission should issue, or his obtaining the benefit of any Act for the relief of Insolvent Debtors, or

making any such composition or assignment as aforesaid, and upon trust to pay the interest, dividends, and annual proceeds thereof, unto *Rose Anna Mara*, and her assigns, for the term of her life ; the same to be paid to her, in case of the bankruptcy or insolvency of *Lawrence Mara*, or of making any such composition or assignment as aforesaid, and for her own sole and separate use, free from and in no way liable to the debts, engagements, or control of *Lawrence Mara* : and from and immediately after the death of *Rose Anna Mara*, or from and immediately after the death of *Lawrence Mara* and the bankruptcy or insolvency of *Lawrence Mara*, upon trust to pay and assign the said sum of 2062*l.*, and the securities upon which same should be invested, unto and among all and every the children of *Lawrence Mara*, on the body of *Rose Anna Mara* begotten or to be begotten, in such shares and proportions as *Lawrence Mara* should appoint ; and, in default of such appointment, *Rose Anna Mara*, in the event of her surviving her husband, should appoint ; and in default of such appointment, to be divided equally amongst them. And by the same instrument the policy of insurance was assigned to the trustees, to be held upon the same trusts as were therein expressed respecting the sum of 2062*l.* And it was provided, that it should be lawful for the trustees and the survivor of them, with the approbation and consent in writing of *Lawrence Mara* and *Rose Anna*, his wife, or the survivor of them, to change and alter the stocks, funds, and securities, whereon the sum of 2062*l.*, or the sum of 500*l.*, should be invested ; and to invest the same in any other stocks, funds, and securities ; and from time to time to transfer, change, or to dispose of the securities whereon said sums should be secured or invested.

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Pursuant to an order of the 30th of July, 1832, made in the cause of *Mara v. Gaffney*, the Accountant-General transferred to the trustees of the settlement so much Bank stock, then remaining in Bank to the credit of the cause, at the price of the day was equivalent to the sum of 20

There was issue of the marriage of *Lawrence Mara* and *Rosa Anna*, his wife, six children, all of whom were under the age of twenty-one years.

Robert L. Hyde died in March, 1833.

In 1829 and 1830 the two trustees, and in 1836 and July, 1840, *Martin D. Manning*, the surviving trustee, upon the urgent solicitation of *Lawrence Mara* and *Rosa Anna*, his wife, sold out portions of the trust funds, and lent the produce thereof to *Lawrence Mara*, upon the security of his bond and warrant (on which judgment was afterwards entered), and an insurance upon his life: and it was a part of the arrangement, made with the privity and consent of *Rosa Anna Mara*, that the trustee should be at liberty to apply a sufficient portion of the dividends and interest of the residue of the trust funds in payment of the annual premiums on the policy of insurance so effected on the life of *Lawrence Mara*.

In April and June, 1838, *Martin D. Manning*, upon the like urgent solicitation and request of *Lawrence Mara* and *Rosa Anna*, his wife, lent the other part of the trust funds to *Michael Mara*, the brother of *Lawrence Mara*, upon the security of his bond, payable with interest at six per cent. Upon this bond judgment was afterwards entered by virtue of a warrant of attorney for that purpose. *Michael Mara*, at the time when he obtained this loan, was a trader; and after

wards became embarrassed in his circumstances, so that the judgment against him became of, comparatively, little value.

On the 2nd of April, 1842, *Lawrence Mara* was discharged as an insolvent debtor. His arrest was concerted, with the privity of his wife, for the purpose of enabling him to obtain his discharge as an insolvent.

The bill was filed by *Rose Anna Mara* and her infant children, against *Martin D. Manning*, *Lawrence Mara*, and (by amendment) the personal representative of *Robert L. Hyde*; and prayed that an account might be taken of all sums of money, which, being part of the trust fund, had been lost by the wilful neglect or default of *Martin D. Manning*, or *Robert L. Hyde*, in his life-time; and that *Martin D. Manning* might be removed from being trustee, and that new trustees might be appointed; and that *Martin D. Manning* might be directed to invest said sum of 2062*l.* in Government, public or landed securities, in the name of such new trustees; and that the rights of all parties might be declared.

The plaintiff did not examine any witnesses. On behalf of the defendant, *Manning*, several letters of *Rose Anna Mara*, to *Martin D. Manning* and his wife, were read. The earliest of them, dated the 7th of June, 1840, was addressed to himself, and implored of him, for God's sake, and Him alone, to empower Mr. *M'Dermott* (his solicitor) to raise 100*l.* out of the trust money, "which can be secured the same as the other," and would save her and her family from destruction. Of the others (which were written after the discharge of her husband as an insolvent), some were earnestly entreating Mr. *Manning* to advance money to her, and others thanking him for his kindness to her. One of the 2nd of October, 1842, was in these terms:

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“ Having at all times acted so kindly and honourable towards me and family, in the trust confided to you, and in advancing several sums of money, I beg leave to request you, on the part of my family, my most sincere thanks to undertake, on the part of my husband and children, not to cause you any trouble or uneasiness for the granting of the present sum of 100*l*.”

Argument. Mr. Longfield, Mr. Lewis, and Mr. Galway, for plaintiff.

Mr. Monahan, Mr. Armstrong, and Mr. Molyneux for the defendant, *Manning*, referred to *Coltman v. Warburton* cited in *Cocker v. Quayle*(a); and submitted that, the funds having been settled to the separate use of Mrs. Manning, she, having concurred in the breach of trust, could not maintain the bill; or at least that the defendant was entitled to be recouped out of her life estate.

Judgment. THE LORD CHANCELLOR :—

This is a distressing case. The defendant, *Manning*, no doubt, committed breaches of the trust reposed in him; but he was induced to do so by the earnest and pressing representations of Mrs. Mara. I am, nevertheless, compelled to say that the trust money must be brought back. Two propositions have been made in answer to the bill: First, that the intervention of Mr. Mara was fraudulently concerted for the purpose of carrying this fund over to his wife. That it was so concerted admits of no doubt; but I think the evidence points to this, that the object of the parties was to make Mr. Mara an insolvent, in order to clear him from his debt.

(a) 1 R. & M 536.

there is nothing to show that the object which the parties had in their contemplation was to carry this fund over to Mrs. *Mara*; although the consequence of the insolvency was, that it was carried over. If it had appeared that Mrs. *Mara* had concurred in making her husband an insolvent, in order thereby to establish her claim to the fund and defeat the equity of the trustee against her husband, I would have felt myself at liberty to give the trustee the relief asked; but the evidence does not amount to that. Next it was said that Mrs. *Mara* is entitled for her life to this fund, to her separate use; that she is not restrained from anticipating it; that she is *sui juris* as to it; and, therefore, that I may declare the trustee to be entitled to the same equity against her, as he is entitled to against her husband. The difficulty is, that at the time when the trustee committed these breaches of trust, at her solicitation, this was a fund to which she might never have become entitled. I have no doubt that, in this case, the wife acted from her own impulse. In cases of this nature the Court is bound to inquire whether the wife has acted under the control of her husband; and whether her very letters are not dictated by him, though written by the wife, because it is thought that, coming from her, they will make a greater impression. But I feel some hesitation in saying, that, because this fund was settled to the separate use of Mrs. *Mara*, the Court can reach it. I will let the case stand for authorities on this point.

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—
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On a subsequent day, the following cases were referred to: *Smith and Wife v. French*(a); *Ryder v. Bickerton*(b); *Cocker v. Quayle*(c); and *Collman v. Warren*(d).

Argument.

(a) 2 Atk. 243.

(c) 1 R. & M. 535.

(b) 3 Swanst. 80, n.

(d) Cited 1 R. & M. 536.

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—
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THE LORD CHANCELLOR :—

I have looked into the authorities which were cited to show that the married woman's interest for her separate use would be bound, as the breach of trust was committed at her solicitation. *Thayer v. Gould*(a) is against the liability ; and in *Smith v. French*(b), although the wife was held to be bound, it was upon a confirmation after her husband's death. The wife was entitled in possession for her separate use ; yet Lord *Hardwicke* said, " that a promise by her to release, during the coverture, it was certain could not bind her." The dicta in *Ryder v. Bickerton*(c), and *Cocker v. Quayle*(d), are in favour of the trustee ; and I hope that the Court may feel itself at liberty to treat a woman entitled for her separate use in possession as *sui juris*, so as to bind her interest where she prevails upon her trustee to commit a breach of trust. But this could only be where the wife really acted for herself, which the plaintiff did in this case : and the case should not be confounded with those where a married woman has been bound by a fraud, in allowing her property to be settled or sold by a third person ; for there she conceals her rights. I have been anxious to reach the wife's interest in this case, which is one of great hardship on Mr. *Manning*, and reflects discredit on Mrs. *Mara* ; but I cannot do so, for at the time she prevailed upon him to commit the breach of trust, Mrs. *Mara* had no interest which she could bind : her interest was contingent as far as it depended upon the insolvency ; and the happening of the event subsequently cannot, I think, give a right to the trustee : but he may, if he shall be so advised, again raise the question in case she shall survive her husband ; and I shall, therefore, reserve to him liberty to apply in that event.

(a) 1 Atk. 615.

(b) 2 Atk. 243.

(c) 3 Swanst. 80, n.

(d) 1 R. & M. 535.

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KENNY v. LYNCH.

April 21, 22.

CHARLES KENNY, being entitled to the lands of Cold Blow, containing five and a half acres, under a lease dated the 26th of July, 1823, made to him for the term of sixty-one years, from the 25th of March then last past, at the rent of 64*l.* 2*s.* 6*d.*, mortgaged the same to secure the re-payment of the sum of 285*l.*; and afterwards, by indenture of the 6th of August, 1829, in consideration of the sum of 50*l.*, assigned the said lands to his son-in-law, *Gabriel Simmons*, subject to the mortgage.

Quere—Whether a grant of an annuity for a term for years, which annuity in the course of time will repay the principal money and more than the legal interest, is or is not usurious? Cases on the subject reviewed.

By indenture of the 16th of April, 1831, made between *Gabriel Simmons*, of the first part; *Peter Lynch*, builder, of the second part; and *John Lynch*, of the third part; after reciting the lease of the 26th of July, 1823, and that *Gabriel Simmons* had contracted with *Peter Lynch* for the sale to him of an annuity of 45*l.* per annum, chargeable upon said lands and premises, and upon all buildings and improvements erected and made, or to be thereafter erected and made thereon, for the price or sum of 300*l.*; *Gabriel Simmons*, in consideration of the sum of 300*l.*, and to the intent to secure payment of said annuity or yearly rent-charge of 45*l.* per annum, to *Peter Lynch*, his executors, &c., “for the period hereinafter more particularly mentioned,” granted, for himself, his executors, &c., unto *Peter Lynch*, his executors, &c., an annuity, annual sum or rent-charge of 45*l.* per annum, to be yearly issuing and payable out of the said lands and premises, and to be paid and payable to *Peter Lynch*, his executors, &c., by two equal half-yearly payments, on every first of November and first of

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May, in every year; with powers of distress and entry in case of non-payment thereof. And for the better and more effectually securing payment thereof, *Gabriel Simmons* granted and demised the said lands and premises to *Johanna Lynch*, his executors, &c., from the day next after the date thereof, for the residue and remainder of the term of sixty-one years; in trust, by demise, sale or mortgage, or out of the rents and profits thereof, to raise and pay all said annuity and all arrears and costs which might become due thereon. And *Gabriel Simmons* covenanted with *Peter Lynch*, that he, his executors, &c., should and would, from time to time and at all times thereafter, pay the annuity or rent-charge of 45*l.* on the days and times thereinbefore mentioned for payment thereof; and that, notwithstanding any act, deed, matter or thing had, made, done, or committed, or wittingly suffered, by *Gabriel Simmons*, he had good title to grant the annuity; and that the said lands and premises should from thenceforth continue and be liable to and charged with the payment of the said annuity, in manner aforesaid; and that the same should from thenceforth be received and taken by *Peter Lynch*, his executors, &c., as thereinbefore mentioned by and out of the before-mentioned lands and premises, free from incumbrances: and for further assurance, at the costs and charges of *Gabriel Simmons*, his executors, &c. And it was thereby further covenanted and agreed, by and between the parties thereto, that until default should be made in payment of the annuity, *Gabriel Simmons*, his executors, &c., might hold and enjoy the said lands and premises, and receive and take the rents and profits thereof, to his and their own use and benefit: and that if *Gabriel Simmons*, his executors, &c., should pay unto *Peter Lynch*, his executors, &c., “the said sum of 300*l.*,” and should also give unto *Peter Lynch*, his executors, &c., six months’ previous

of his or their intention so to do ; and that *Gabriel Simons* should also pay all arrears of the said annuity to *Peter Lynch*, and all costs, charges, and damages which might be occasioned by the non-payment thereof ; that but not otherwise, *Peter Lynch* and *John Lynch*, executors, &c., should and would reconvey, transfer, over, and extinguish the said annuity or yearly rent of 45*l.*, to and for the benefit of *Gabriel Simmons*, executors, &c., or to any person to be appointed by or that purpose. This deed was registered shortly after its execution.

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In consideration for the assignment of the 6th of March, 1829, was not paid : and, pursuant to an arrangement between the parties for that purpose, *Gabriel Simmons* by indenture of the 1st of May, 1831, assigned and conveyed the said lands and premises to *Charles Kenny*, executors, &c. ; who thereupon entered into possession, and paid the annuity of 45*l.* per annum, to *Peter Lynch* and his executors, up to the 1st of May, 1842.

Peter Lynch died in January, 1842 : *Philip Lynch* was his executor.

Charles Kenny having refused to make any further payment on foot of the annuity, on the ground that the deed of the 1st of May, 1831, was a fraudulent contrivance to evade the Statute of Usury, and that the principal sum of 300*l.*, with interest thereon at six per cent., had already been paid off in reception of the annuity, *Philip Lynch*, in October, 1842, made a distress on the premises for one year's arrears of the annuity, due the 1st of May, 1843. *Charles Kenny* replied ; and that action was still pending.

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 —
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On the 31st of December, 1843, *Charles Kenny* caused a notice to be served on *Philip Lynch* and *John Lynch* stating that the principal sum and interest had been overpaid by the perception of the annuity of 45*l.*, and requiring them to convey the lands and premises to him, discharge of the annuity. No reply was given to that notice.

The present bill was filed on the 17th of January, 1844 by *Charles Kenny*, against *Philip Lynch* and *John Lynch* stating that, in 1831, *Gabriel Simmons*, being embarrassed in his circumstances, applied to *Peter Lynch* for a loan of the sum of 300*l.*, which sum *Peter Lynch* agreed to advance and that *Peter Lynch*, taking advantage of the necessitous circumstances of *Gabriel Simmons*, insisted that, in consideration of such loan and the forbearing and giving time for the payment thereof, *Gabriel Simmons* should grant unto him the sum of 45*l.*, to be issuing and payable out of the said lands and premises, yearly and every year, for the residue of the said term of sixty-one years, or until *Gabriel Simmons* should pay unto *Peter Lynch* the said sum of 300*l.*, and also give to *Peter Lynch* six months' notice of his intention so to do, and also pay all the arrears of the said annual sum of 45*l.* which should have accrued due in the mean time, and all costs, charges and damages which might be occasioned by the non-payment thereof. The bill prayed that it might be declared that the deed of April, 1831, was fraudulent and unlawful; and was to be deemed merely as a security for the repayment of the principal sum of 300*l.* with interest thereon, at the rate of six per cent.; and for the accounts and relief consequent on such a declaration.

Gabriel Simmons, and the attorney who prepared the deed of 1831, were dead when the bill was filed.

the plaintiff's evidence was confined to the proof of the
of August, 1829, April, 1831, and May, 1831; and
the deaths of *Gabriel Simmons* and the attorney who
wrote the deed of April, 1831.

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Argument.

Monahan, Mr. *Hughes*, and Mr. *W. Smith*, for
Kenny.

The plaintiff has not given any parol evidence of the
agreement between the parties which led to the grant of the
annuity; he relies on this, that where, in consideration of a
sum of money, an annuity is granted for a certain term of
years, and upon calculation it appears that, by means of the
annuity, the grantee will receive more than the consider-
ation-money and legal interest, the transaction is usurious.
There are many authorities establishing that position. In
Grimes(a), *Bayley*, J., says(b): "There is no case
in which an annuity for years has been held not to be usu-
rious; where, on calculation, it appeared that more than the
consideration, together with legal interest, is to be received."
In *Doe v. Chambers(c)*, *Trustam* being entitled to the
residue in question, under a building lease, for the residue
term of fifty-three years, agreed with the defendant
that the defendant should advance him 600*l.*, in addition to
the sum then lent him by the defendant; and that for
sum *Trustam* should assign his lease to the defen-
dant and that the defendant should then grant to *Trustam*
an under-lease of the premises for seven years, at 70*l.* a year,
a proviso that at any time within the seven years,
Trustam, on repaying the 900*l.*, should be entitled to a
reassignment; and that, by the under-lease, *Trustam*

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should covenant to insure the premises, to keep them in repair, and to pay the ground rent, together with all taxes. An assignment and under-lease, in pursuance of this agreement, were accordingly executed. Lord *Ellenborough* said that the question was, whether the transaction was a contrivance to receive usurious interest for the loan of money; and added: "If *Chambers* ran any risk, or the repayment of the principal was liable to any contingency, there would be usury; but I see no risk or contingency involved in the transaction, except the solvency of the borrower." In *Ferdinand v. Wightwick*(a), an annuity was granted for a term of years, payable half-yearly; and it appearing that the several half-yearly payments would repay the purchase-money with interest exceeding the legal rate, the transaction was held to be usurious. *Chillingworth v. Chillingworth*(b) is a decision to the same effect. In *Bulwer v. Astley*(c) (in which the question was not whether the transaction was usurious or not), the Lord Chancellor, speaking of borrowing money upon an annuity, says: "The effect of the transaction is, that the money borrowed is to be repaid by instalments, consisting partly of interest and partly of principal, whether the annuity be for a term of years, or for a life or lives, the transaction is in substance the same. The value of the life, in respect of its probable duration, is a matter of calculation; and as the principal is put in hazard, the amount of interest is not regulated by the Statute of Usury, which is the only material distinction." So in *Floyer v. Sherard*(d) the Lord Chancellor says, "that an annuity redeemable is an evasion of the Statute of Usury, and only a loan for money." As to *Ferguson v. Sprang*(e), it came on upon

(a) 1 R. & M. 45.

(b) 8 Sim. 404.

(c) 1 Phil. 422.

(d) Amb. 19.

(e) 1 A. & E. 576.

demurrer to a declaration on a contract for the purchase of an annuity of 20*l.* for sixty years, for the price of 200*l.* ; and merely decides that the Court of Law would not, judicially, take notice that more than the principal and legal interest was to be repaid. And in *M' Cormick v. Ferrier*(a), where the question arose collaterally, the deed was equivocal in its nature, and the jury found that it was not usurious.

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Mr. Moore, Mr. W. Brooke, and Mr. Kernan, for Philip Jack.

The case depends solely on the construction of the deed. The defendant swears that to his knowledge and belief, there never was a loan contemplated between the grantor and grantee; and that this was always an annuity transaction. The security for the annuity is very insufficient, which may amount for the price given for it. The clause of re-purchase does not prove that the transaction is a loan: *Irnham v. Child*(b); *Vernon v. Winstanley*(c). There is no case strong in its external appearance, in which a Court of equity or a jury may not infer that the transaction was in reality a loan, and not the grant of an annuity. But if the transaction be really and *bonâ fide* a dealing for the grant of an annuity, it will not be void because the annuity is granted for a term of years, and it appears on calculation, that more than the consideration money and legal interest on it will be repaid by perception of the annuity. It cannot be denied that the purchase of an annuity for the term of a life is valid, though thereby the grantee receives more than the purchase-money and legal interest. There is no more reason why a man should not be permitted to purchase an annuity for a term of years, than

(a) *Hayes & J.* 12.
(b) *1 B. C. C.* 93.

(c) *2 Sch. & Lef.* 394.

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that he should be permitted to purchase a profit rent for a like term of years. The ground of all the doubts which have been thrown upon this subject is the *dictum* of Bayley, J., in *Doe v. Gooch*(a). But he could not when he gave utterance to it, have had the old authorities which are express upon this subject, in his mind; and the principal case itself is a refutation of his *dictum*; for Lord Tenterden left the question, whether the transaction was a purchase or a loan, to the jury, instead of directing them to find that the deed was usurious. The cases of *Symonds v. Cockerill*(b), *Fanfield v. Finch*(c), *Fuller's case*(d), and *The King v. Drury*(e), establish that the purchase of an annuity for a term of years is valid, although thereby the grantee should be paid back his purchase-money with more than legal interest. *Fereday v. Wightwick* is more fully reported in *Tamlyn*(f), where it appears that the transaction was, in its inception, a loan. So also was *Chillingworth v. Chillingworth*. These cases are, therefore, inapplicable to the present. *Rowe v. Bellaseys*(g), and *Spurrier v. Mayoss*(h), were referred to.

Mr. Hughes in reply.

There is no evidence of the value of the lands on which the annuity is charged; it may be building ground. The deed of 1831 shows, on the face of it, that the transaction was, in its inception, a loan. It is inartificially drawn, and does not expressly mention the term for which the annuity was granted. The clause of re-purchase is, in reality,

(a) 3 B. & A. 669.

(b) Noy, 153.

(c) Cro. Eliz. 27.

(d) 4 Leo. 208.

(e) 2 Leo. 7.

(f) Page 250.

(g) 1 Sid. 182.

(h) 1 Ves. Jun. 527.

clause of redemption ; and this is in effect, an agreement to repay the 300*l.* and usurious interest in seventy instalments. The cases relied on by the defendant were cited in *Chillingworth v. Chillingworth*, and there overruled. The true principle is stated by *Joy, C. B.*, in *M'Cormick v. Ferrier*, "that, if it be meant that the sums received should be taken into account, the deed would not be usurious : but if the grantee were to hold all the rents received, and be paid the entire principal sum besides, it would be usury."

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Argument.

THE LORD CHANCELLOR :—

I have looked into the authorities bearing on this case, and I have read the annuity deed. It is in the common form of a grant of an annuity, without anything of a loan apparent on the face of it, except that the power of re-purchase is in unusual terms. It begins by a covenant that if the grantor of the annuity should pay the purchase-money ; whereas, the usual form is, that if the grantor be desirous of re-purchasing the annuity, and of such desire give certain notice, then, on payment of the purchase-money the grantee will assign the annuity. However, I think that this is merely a covenant for re-purchase ; and that the deed, on the face of it, is a mere grant of an annuity for a term in gross ; the payments in respect of which, no doubt, would, on the whole term, exceed the principal money paid and legal interest on it. There is a covenant for payment of the annuity : but there is no evidence to show that there was a treaty for a loan, or that this was a shift to evade the usury laws ; unless, upon the face of the instrument itself, it should be held that such an intent ap-

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pears. The defendant in his answer swears that ~~there~~ never was a treaty for a loan between him and the grantor; and that this was a *bond fide* purchase of an annuity. The case, therefore,—unless as far as anything can be inferred from the power to re-purchase,—appears to raise the naked question, whether a grant of an annuity for a term of years, which annuity, in the course of time, will repay the principal money and more than legal interest, is or is not usurious? There is this singularity in the case, that there is no estate or term for which the annuity is expressly granted: that is a question of construction; but probably it would be held that it was granted for the term in the lands. No other term is mentioned in the deed, and the annuity is secured upon that property.

I am much embarrassed by the state of the authorities. The old law appeared to have settled that a *bond fide* grant of an annuity, in consideration of a sum in gross, and for a term certain, not depending on a contingency, was not usurious, if not intended as a shift to evade the usury laws: for there is no doubt that any shift to evade those laws, if the jury should come to the conclusion that it is a shift, is void. Whether the transaction be a shift or not is a question of substance, not form; but at the present I assume that this is a *bonâ fide* transaction, and the question is, whether it is void or not. I do not say, void on the face of it; for in *Ferguson v. Sprang*(a) the Court held that they could not make the calculation, and see whether the annuity would more than repay the principal sum with interest. That they would so exceed must be found, as a fact, by the jury or the Court.

(a) 1 A. & E. 576.

The old cases appear to establish that a grant of an annuity for a term, assuming it to be a *bond fide* transaction, wholly free from usury, and unconnected with a loan, is valid: and I know that such transactions have taken place, upon great authority at the bar. The attempt has often been made to evade the usury laws, but without success. This was especially the case in the *Brighton cases*(a). A landholder about to build, and desirous to raise money, used by one instrument to assign his building-lease in consideration of a sum of money, reserving a power to re-purchase it, and by another instrument to accept an underlease of the same premises from the person to whom he had assigned them, at an increased rent; and the original lessee covenanted to perform all the obligations in the original lease. This was, in fact, a loan at interest greatly exceeding the legal rate; and I always was of opinion that such transactions were void, as being usurious and mere shifts to evade the Statute. No person ever imagined that the assignee was to retain the property: the money was to be laid out in building on the property, and the power to re-purchase was always exercised: and in *Doe v. Gooch*(b), and *Doe v. Chambers*(c), it was held that such transactions were usurious.

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In regard to life annuities, it was at one time held that the introduction of a power to re-purchase made them usurious; it used, therefore, to be omitted: but the law has since been settled otherwise, and such annuities are now granted upon a calculation of a certain rate of interest upon the money paid, as if it were a debt, and of the pre-

(a) *Doe v. Gooch*. 3 B. & A. (b) 3 B. & A. 366.

i. (c) 4 Camp. 1.

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miums on a policy of insurance to be effected on the life of the *cestui que vie*. And to such an extent has this been carried, that Lord *Lyndhurst* has held(a) that an annuity is a debt due to the grantee. Of course, he did not mean to decide that the transaction was such between the parties to it, but that it was such in its real nature.

I do not find that there has been any actual decision, overruling the old authorities. The case of *Doe v. Chambers* was a mere shift to obtain more than legal interest; for there having been originally a loan, there was then a further advance, and the whole was secured by an under-lease, with a power to re-purchase. The property in that case, at the time of the transaction, was found by the jury to have been worth 2000*l.*, and the sum advanced was only 900*l.*, no person could, therefore, doubt that the power to re-purchase would be exercised, and the principal be repaid. It was a mere shift to evade the usury laws. *Doe v. Gooch* was an assignment and under-lease, and clearly an usurious transaction. Neither of these cases touches the present, as authorities precisely in point; but it was in the latter of these, that *Bayley, J.* made the observation upon which all the modern cases have turned. It was an *obiter dictum*, not at all necessary for the decision of that case. In *Spurrier v. Mayoss*(b), *Eyre, C. B.*, and in *Doe v. Gooch*(c), *Abbott, C. J.*, held that *Rex v. Drury*(d) was distinguishable, and that it was good law; which, though not going the whole extent, yet bears strongly on the argument in this case. *Bayley, J.*, said in *Doe v. Gooch*: "The principal is in hazard,

(a) In *Bulwer v. Ashley*,
1 Phil. 422.

(b) 1 Ves. Jun. 527.

(c) 3 B. & A. 664.

(d) 2 Lev. 7.

from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received." That cannot be quite correct; for, unless the former cases are expressly overruled, there are cases which have decided it: nor am I aware of any case which has decided the precise point he has laid down. The decision in *Fereday v. Wightwick*(a), proceeded upon the fact that promissory notes were, at the date of the transaction, given for all the payments to be made. That at once showed that it was a money dealing between the parties. It was not an annuity transaction, resting upon the annuity securities merely; but the party obtained promissory notes, which he might discount, and so at once realize the principal and interest. The report of the case in *Russell & Mylne* is short; but that in *Tamlyn* is fuller, and states the ground of the decision. The learned judge said: "The transaction was accompanied by notes, which were respectively to the amount of a half year's annuity. It is a mere colour, that this is the purchase of an annuity. Several old cases have been referred to, which, however, I do not think it necessary to consider. What in substance is this transaction? Is it not in effect a loan?" From the report in *Russell & Mylne*, it would appear as if Sir J. Leach thought that the old authorities had nothing to do with the question. But I do not consider him as saying that he gave no attention to the old authorities, but that he did not feel called on to consider them, because the transaction before him was clearly usurious upon other grounds. In *Ferguson v. Sprang*(b), which is the same

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(a) 1 R. & M. 45.

(b) 1 A. & E. 576.

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as the present case, except in respect to the power re-purchase, the question arose upon demurrer; and Court said that they could not hold the transaction be usurious upon the face of the deed, for they could make the calculation. But I must say that the reason of the Court leads to the conclusion, that they would have held the transaction usurious if it had appeared in evidence that the annuity would, in course of time, more than repay the principal and interest. They did not, however, decide that point, though they expressed themselves strongly upon it. *Chillingworth v. Chillingworth* was decided upon the evidence, upon which the Vice-Chancellor came to the conclusion that the transaction was, in reality, a loan; and though he intimates an opinion that, if the payments to be made in respect of the annuity exceed the principal sum and interest, the transaction is usurious, yet he does not decide the case upon that view of it. The only other case bearing upon this question is *M'Cormick v. Ferrier*(b); and there the Court, I think, gave a weight to *Doe v. Chambers* which it is not entitled to, as bearing upon this question. But, as I understand that case, the jury found that the transaction in question was not usurious, and the Court refused to disturb the verdict: for the question was, what was the interest which the plaintiffs had, entitling them to recover under the policy of insurance. If the annuity transactions were usurious, they had a less interest by 100*l.* than the sum for which the verdict was given. The jury found that the transaction was not usurious, against the leaning of the judge, but not so much so that the Court would disturb it.

(a) 8 Sim. 404.

(b) Hayes & Jones, 12.

of this review of the cases is, that I do not
 entitled to overrule the old authorities, which
 many *bond fide* transactions carried into ex-
 good advice : nor am I called upon to do so.
 erefore, to send a case to the Queen's Bench,
 to the validity of this transaction, as it appears
 of the deed ; with the statement of this addi-
 stance, that, upon calculation, it appears that
 of the payments to be made on account of the
 he whole term, would exceed the principal sum
 rest on it, for that period ; and also stating
 action was for the purchase of an annuity,
 n.

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ed that a replevin suit was pending, in which
 of the validity of the deed would be decided.

D CHANCELLOR.—Then retain the bill for a
 erty to proceed in the replevin suit : the only
 e tried in it to be, whether this transaction is
 ot.

BROWN v. MARTYN.

as filed by the executor and devisee for life
 tate, to carry the trusts of the will of his testa-
 tion ; and that it might be declared that he
 absolutely, to the residuary personal estate.
 was stated to be, whether the personal estate
 a general devise and bequest of all the testa-
 d personal estate, which was settled to the

April 23.

The Court will
 not, in a suit to
 carry the trusts
 of a will into
 execution,
 merely declare
 the rights of
 the parties, and
 then leave them
 to act on that
 declaration
 out of Court.

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—
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same uses as the real estate ; or whether it passed, or a residuary bequest of the personal estate, to the plaintiff absolutely. The defendants were the devisees of the estate ; the legatees were not parties to the suit.

The LORD CHANCELLOR having intimated an opinion that the question was not ripe for a decision, until it should appear whether there would be a residue, Mr. *Mona* for the plaintiff, asked the Court to decide the question at the present hearing, as, in the event of the Court being of opinion that the plaintiff was entitled to the residue absolutely for his own benefit, further proceedings would be unnecessary ; for the executor would be obliged to pay debts and legacies.

Judgment.

THE LORD CHANCELLOR :—

This raises the abstract question, whether the Court may make a declaration of right merely, without administering the fund. Generally, the Court, when it makes a declaration of right, directs accounts or inquires into the consequences thereon. Here the plaintiff asks for a declaration, not as furnishing the principle upon which the accounts are to be directed, but in order to prevent the taking of any account. He desires to have a declaration from the Court, that he is entitled absolutely to the residuary personal estate, subject to the payment of the debts and legacies, and then to be permitted to deal with the creditors and legatees out of Court. It is against the course of the Court to do so ; but if any authority upon this point can be produced, I will hear the question debated.

It was admitted that there was no authority upon this subject ; and the usual accounts were directed.

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GREVILLE, *Petitioner*, FLEMING, *Respondent*.(1 & 2 *Vic. c.* 109.)

THE petition prayed that a receiver might be appointed over the lands of the respondent, for payment of tithe rent-charge due the 1st of May, 1844.

The affidavit of the land agent of the petitioner stated, that on the 14th of January, 1837, *William F. Greville*, the lay impropriator of the parish of Scraby, died; and that the petitioner, his eldest son, thereupon became, and had ever since continued, and then was the lawful lay impropriator of the parish, and entitled to all tithes or rent-charge in lieu of tithes in respect of the lands situate in the parish, payable to the lay impropriator of the parish for the time being. That in 1823 a composition in lieu of tithes was duly effected, pursuant to the Statute: and, that by certificate of the 26th of October, 1823, the commissioners certified that the amount of the composition for all tithes within the parish was 171*l.* per annum; of which the sum of 95*l.* per annum, being five-ninth parts thereof, was due to the *Rev. C. R.*, who was the vicar; and 76*l.*, being the remaining four-ninths, was due and payable to the lay impropriator of the parish. The certificate did not name any person as being the lay impropriator.

April 20, 21.

The Court would not, at the instance of a lay impropriator, appoint a receiver for payment of tithe rent-charge, upon an affidavit merely stating that he was the lay impropriator of the parish; where it appeared that his title to the tithes had been and still was contested by the parishioners, and the only payment he had obtained out of the lands of the respondent was by the hands of a receiver of the Court, appointed in the suit of a third person.

The affidavit then stated the applotment, and the amount for which the respondent was liable, in respect of the lands the petition mentioned, viz., 171*l.* 9*s.* 1½*d.* per annum; and that said sum continued payable to *William F. Gre-*

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 v.
 FLEMING.
 —
Statement.

ville, as such lay impropriator, until his decease ; and from the period of his decease, became and continued payable to the petitioner (as deponent believed), until the passing of the 1 & 2 Vic. c. 109, whereby a yearly rent-charge of 13*l.* 1*s.* 10*d.*, equal to three-fourths of the sum of 17*l.* 9*s.* 1½*d.* became chargeable on the lands, and was payable to the petitioner in lieu of such tithe composition.

That one *J. S. Fleming* was, at the time of the passing of the 1 & 2 Vic. c. 109, seised of the first estate of inheritance in the lands ; and that the respondent then was seised and possessed thereof. That at the time of the passing of the 1 & 2 Vic. c. 109, and for some time after, a receiver of the Court of Chancery, in the cause of *Fleming v. Fleming* and *Browne v. Fleming*, was in the receipt of the rents of the lands ; and that deponent, on applying to the receiver for payment of the rent-charge, was required by him to procure the approbation of the Master in the cause ; that he accordingly filed a statement on behalf of the petitioner, and obtained a certificate of the Master's approbation, and was thereupon paid the amount of the rent-charge by the receiver up to the 1st of May, 1842 ; and that the rent-charge from that period was still due.

In answer to the application, affidavits were made by the solicitor and the land agent of the respondent, submitting that the petitioner had not shown any right or title in himself to the rent-charge. They stated that the claim of the petitioner to be lay impropriator of the parish had not been acquiesced in ; but, on the contrary, had been the subject of opposition and dispute. That the petitioner had on several occasions attempted to establish his right to the impropriate tithes, and

had failed; and especially that at the time of making the composition, notice was given by the Commissioners to all claimants, to come forward and establish their claims to the tithes of the parish; and that one *Slevin* then claimed to derive title to the impropriate tithes under *W. F. Greville*, but that the commissioners rejected his claim; and no claim whatever on behalf of *W. F. Greville* was then established before the Commissioners. That several of the landed proprietors throughout the parish had refused to pay; and that the petitioner had only lately obtained some isolated payments: and that before the passing of the 1 & 2 Vic. c. 109, the tenants of the lands mentioned in the petition had refused to pay the tithe composition to *W. F. Greville*; and that no payments were made to him out of the lands. That the respondent became entitled to the lands under a conveyance from *J. S. Fleming*, dated the 20th of April, 1835; and submitted that nothing afterwards done by *J. S. Fleming* or the receiver could affect the rights of the respondent.

Upon these documents the Master of the Rolls made an order for the appointment of a receiver, pursuant to the prayer of the petition.

The respondent now moved, by way of appeal, that the order of the Master of the Rolls be set aside: and, in support of that application, his solicitor made an additional affidavit, stating that he had been informed and believed that *William F. Greville*, the father of the petitioner, did not, nor did any person on his behalf, receive any payment in account of the impropriate tithes, from the year 1823 down to the year 1837, from *J. S. Fleming*, or any of his tenants or other person, for the lands in the petition men-

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tioned: and that the reason for non-payment was that *Richard F. Greville* was not able to show any title to the impropriate tithes: that when the respondent became the purchaser of the lands, the annual outgoings in respect of the charges affecting them, amounted nearly to the entire rental; and that, under these circumstances, due attention was not given to the proceedings in the cause of *Fleming v. Fleming*, no person being much interested in contesting the claim for tithe rent-charge. The agent for the respondent made an affidavit in reply; but did not notice the statement, that *W. F. Greville* never, from 1823 to 1837, received any payment on account of the tithes, from *J. S. Fleming*, or the tenants on the lands.

Argument.

Mr. Butt and *Mr. F. Walsh* for the respondent.

The certificate is invalid, as it does not state the name of the person to whom the composition in lieu of the impropriate tithes was payable; *O'Leary* on Tithes, 192; 4 Geo. IV. c. 99, secs. 16 and 25, and schedule B.; 1 & 2 Vic. c. 109, s. 26. *Mr. Greville*, if entitled, might have appealed against the certificate for the omission; 4 Geo. IV. c. 109, secs. 28 and 30. Yet, though the claim of a person deriving under him was rejected, he did not appeal. But, at least, the certificate is not evidence of title in the petitioner: and, under the circumstances, no weight is to be given to the payment of the rent-charge by the receiver of the Court.

Mr. Moore and *Mr. Sproule* for the petitioner.

The object of the Tithe Composition Acts was to ascertain the amount of the composition payable in the parish, and the shares in which it was payable to the owners; but

the Commissioners had no power to investigate or decide upon conflicting claims of lay impropiators: and the twenty-fifth section shows that it was not imperative on the Commissioners to adopt the form of the certificate in schedule B. *in omnibus*. The alleged claim of *G. Stevin* is merely stated on information; and as it does not appear that it was made with the concurrence of Mr. *Greville*, he ought not to be prejudiced thereby. The order appealed from is correct. The affidavit of the agent states positively that the petitioner is the lay impropiator of the parish. The Act of Parliament does not require him to set out his title on his petition. In support of the statement that the petitioner is entitled, it appears from the certificate that there is a composition payable to some lay impropiator; it is not alleged that the lands are tithe free; nor does the respondent set up the title of any third person as lay impropiator; and tithe rent-charge has actually been paid out of those lands to the petitioner. These facts combined establish the title of the petitioner.

Mr. *F. Walsh* in reply.

The Court will not exercise its summary jurisdiction under this Act, unless the title of the petitioner is perfectly clear; but will leave him to his remedy by plenary suit or action at law.

THE LORD CHANCELLOR:—

No doubt it is in the sound discretion of the Court whether it will appoint a receiver. This is a case of considerable difficulty. First, it is rather suggested than contended

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that the certificate is void, because the name of the lay impropiator is not inserted in it. I should be slow to hold it void on that ground, for it would place parties in a great difficulty in cases in which the Commissioners had doubts as to the rights of the lay impropiator, and therefore, refused to insert his name : and though that may not have been the fact in this case, yet the question of title may have arisen in the investigation. It appears to me that no power was given to the Commissioners to settle questions of title ; and that their power was confined to the ascertainment of the amount of tithe composition, and the proportions into which it was divisible between the several owners of the tithe : and the words of the Act, with reference to the appeal given to the Lord Lieutenant, or to the Judges of Assize, seem to point to the same conclusion.

But I am not called upon to decide that point ; for no person insists that the title in this case is concluded by the certificate, assuming it to be a valid one. I will, therefore, assume,—first, that the certificate is valid, and secondly, that the title is not concluded by it ; for it cannot be held that the title of Mr. *Greville* is concluded by a certificate in which the name of the lay impropiator is not inserted. If Mr. *Greville* can show, *aliunde*, that he is the lay impropiator, the certificate has reference to him. It relates to the party, whoever he may be, who has the title.

It is stated in the affidavit of the agent of the respondent, no doubt upon information and belief merely, and at the distance of several years from the period to which the

matter relates, that the Commissioners refused to insert the name of Mr. *Greville* as the impropiator, because they were not satisfied he was entitled, as such, to the tithes. Now the Act of Parliament gave an appeal to any person aggrieved by anything improperly inserted or omitted from the certificate. Here there was an omission: and Mr. *Greville* might, if he had thought proper, have appealed to have his name inserted in the certificate; but he did not do so. I must consider that from 1823, when the certificate was made, omitting the name of Mr. *Greville* as the person entitled, but stating that the lay impropiator was entitled to a portion of the composition, no claim whatever was made by Mr. *Greville* for tithe composition until the year 1839. It is said, as some excuse for this delay, that Mr. *Greville* first became entitled to the composition in 1837. His succession to the possession fell in at that time, but his title commenced, perhaps, centuries before; and I am bound to consider not merely what was done in 1837, or since, but on the question whether I am to grant this summary relief, I must consider the root of the title:—how did the *Grevilles* acquire it; what enjoyment had they under it; what is their proof of title; is it proved in the ordinary way by a grant from the Crown, and a derivation under the grant, or by mere transfers and conveyances between themselves, or by descents and actual receipt of the tithes? All that I have on the face of this affidavit is a mere statement that the father of Mr. *Greville* was entitled to these tithes, and that his son succeeded to his title in 1837. I have no doubt that if an attorney tells his client that he is entitled to certain property, the client will swear to it; but I cannot consider such swearing a proof of the title. It is a circumstance, too, entitled to some weight, that the

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payments were made by a receiver of the Court, at a time when the party who was entitled to the lands was involved in litigation. It, therefore, is not like a payment by party in possession of his own property, with full notice of the nature of the claim made on him. It can be easily imagined that, during the embarrassment occasioned by the pendency of a litigation, a person may get a payment of a small demand from a receiver, where he could not have procured it from the party himself, if he had been in possession of his estate. The payment, however, is *prima facie* evidence of the title of the petitioner. But the facts which have not been denied by affidavit, that the Commissioners refused to insert Mr. *Greville's* name in the certificate because of the doubt they entertained as to the title, and that his title has been contested by other persons in the parish, make it necessary that I should pause before I appoint a receiver upon this summary application: for if I grant this receiver, and there should hereafter be a default, I must grant another; and so I should establish this for ever. For how could the respondent relieve himself? I am not aware of any mode whereby he could; for he could not try the title of the *Grevilles* to the tithes; he could not resist the order of the Court, and there is no appeal, I believe, against an order made in the case of a summary proceeding. But, however that may be, I should certainly conclude the question of title by granting this application; whereas, by leaving the petitioner to his remedy, I shall do no mischief: for if Mr. *Greville* has title, he has the means of proving it, and can recover the rent-charge by other proceedings than by a receiver or a petition. I should, therefore, feel much difficulty in refusing this order. I have great respect for the auth-

by which it has been made; but I cannot concur in it. There is quite sufficient to show that there is a doubt about the title. The respondent, no doubt, is fencing off the payment of this demand; and, not denying that tithe rent-charge is really due, he is endeavouring to get rid of the petitioner's claim, in the hope that no other person can establish a title to the tithes. But, sitting here, I am not at liberty to take that into consideration. I must look to the title of the petitioner, and not to the object of the respondent. I think that title has not been reasonably established, so as to authorize me to exercise this jurisdiction; and, therefore, upon the whole case, I must reverse the order.

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Judgment.

In re DANIEL FLANAGAN, a Lunatic.

MR. COPPINGER, on behalf of *Patrick Bourke* and *Michael King*, moved that the report of the Master in this matter be confirmed; and that the applicants be appointed committees of the person and estate of the lunatic; and that the lunatic be discharged from the custody of the Sheriff of the county of Clare, and given in charge to the applicants.

May 8.
Mode of proceeding by the committee, to obtain possession of the person of a lunatic, who, before inquisition found, had been committed to custody under the 1 Vic. c. 27.

The Master by his report found that the applicants were fit and proper persons to be appointed committees of the person and estate of the lunatic.

At the time when the commission issued, the lunatic was confined in the gaol of the county of Clare; having

1845. been committed as a dangerous lunatic, under a warrant by two Magistrates, pursuant to the 1 Vic. c. 27, s. 1.

In re
FLANAGAN.

Judgment. THE LORD CHANCELLOR :—

I cannot make an order for the delivery of the lunatic to the committee. He is in lawful custody. There must be a distinct order under the Act, made by me as Chancellor, for the discharge of the lunatic from custody : and then a separate order made on this petition, in the matter of the lunacy, that the committee do take possession of the lunatic when discharged.

PLUNKETT v. MANSFIELD.

April 29.

A sum of 7500*l.* Bank stock was vested in trustees, upon trust, out of the proceeds thereof, to pay an annuity of 561*l.* to *F.* for life ; and to invest the residue in Bank stock or Government security : and

upon trust that, after the decease of *F.*, the 7500*l.* Bank stock, and the savings of the dividends or proceeds thereof, be divided into five equal shares, a share to be transferred to each of five persons therein named.

One-fifth of the 7500*l.* Bank stock was, upon the marriage of one of the persons entitled to the *corpus* of the trust fund, in the life-time of the annuitant, made the subject of settlement :—*Held*, upon the intention of the parties, to be gathered from the nature of the instrument, and upon its construction, that one-fifth of the accretions by way of bonus subsequently added to the original capital sum, and also one-fifth of the surplus dividends, were subject to the trusts of the settlement.

Another of the persons entitled to one-fifth of the *corpus* of the trust fund, by Indenture, reciting that he was entitled, after the decease of the annuitant, to one-fifth of the sum of 7500*l.* Bank stock, in consideration of the sum of 500*l.*, sold and assigned 750*l.*, or one-half of the sum of 1500*l.* Bank stock, and all his estate and reversionary interest therein :—*Held* that the purchaser was not entitled to the accretions by way of bonus, which had been afterwards declared on the 750*l.* stock, or to the surplus dividends thereof.

ony, for life, with divers limitations over ; and giving
son *Thomas* a sum of 5000*l.*, and to his daughters,
and *Frances*, legacies of 4000*l.* each, payable to
at twenty-one or marriage, and bequeathing several
legacies, he gave the residue of his fortune, effects,
ibstance to go and be equally divided amongst his
his two sons, *Anthony* and *Thomas*, his daughters,
and *Frances*, and also the child, whereof his wife was
nciente, share and share alike : and appointed his wife
ro other persons executors, and guardians and trus-
f the persons and fortunes of his children.

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ven *M'Dermott* died in December, 1786, leaving his
nd the four children named in his will, all of whom
nfants, him surviving. The child of whom his wife
en enciente, was afterwards born, and died an infant
age of one year.

1809, all the children of *Owen M'Dermott* having
ed their age, accounts were settled between them
e executors and trustees of the will : and by Inden-
f the 4th of August, 1809, made between *Anthony*,
as, *Mary*, and *Frances M'Dermott*, and *Frances*
nna otherwise *M'Dermott*, the widow of *Owen*
rmott (who had married *Theobald M'Kenna*), of
rst part ; *Denis O'Brien*, acting executor of *Owen*
rmott, of the second part ; *Matthew James Plunkett*,
Byrne, and *Joseph Laffan*, of the third part ; after
ig, *inter alia*, the settlement of the accounts, and the
due to the children of the testator respectively, on
f the rents of the real estate, and the legacies be-
ned to them by the will ; and that it had been agreed
en the several parties that the sum of 7500*l.* Bank

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stock, should be retained out of the residue, undivided and be transferred to and vested in the trustees, *Plunkett Byrne*, and *Laffan*, as a fund for the payment of two annual sums of 500*l.* and 61*l.* 3*s.* 10*d.* to *Frances M'Kenna* and her assigns, during her life; and upon her death, then, that the said sum of 7500*l.* Bank stock, together with the value of a certain rent therein mentioned should be assigned and transferred as thereafter mentioned; it was declared and agreed by and between parties thereto, that the said 7500*l.* Bank stock, so agreed to be transferred to and vested in the trustees, was to be taken upon trust to pay, out of the interest or proceeds thereof, the said several yearly sums of 500*l.* and 61*l.* 3*s.* 10*d.*, making together 561*l.* 3*s.* 10*d.* yearly unto *Frances M'Kenna* and her assigns, during her life according as the same should become due and payable; and if there should be any residue annually after payment of said sum of 561*l.* 3*s.* 10*d.*, then, for the said trustees to invest the same, from time to time, in Bank stock or Government security, for the benefit of *Anthony M'Dermott*, *Thomas M'Dermott*, *Frances M'Kenna*, *Mary M'Dermott*, and *Frances M'Dermott*: and from and after the death of *Frances M'Kenna*, then that the sum of 7500*l.* Bank stock, and the savings of the dividends or proceeds thereof (if any), together with the value of a certain rent of 44*l.* per annum, to be divided into five equal parts or shares; one part whereof was to be transferred and made over to each of them, the said *Anthony*, *Thomas*, *Mary*, and *Frances M'Dermott*, and *Frances M'Kenna*, their executors, administrators, and assigns.

By settlement executed upon the marriage of *M'Kenna* with *Edward Blake*, dated the 2nd of June

1810, after reciting that *Mary M'Dermott* was then, in her own right, possessed of the principal sum of 12,700*l.* sterling, and was further entitled, upon the death of her mother, *Frances M'Kenna*, to receive one-fifth part or share of 7500*l.* Bank stock, then remaining in the Bank of Ireland, in the names of Messrs. *Plunkett*, *Byrne*, and *Laffan*, the interest or dividends upon which was payable to the said *Frances M'Kenna* during her life ; it was by said indenture agreed by and between all the parties thereto, that as to the said undivided part or share of the said Bank stock,—subject to the interest or dividends thereon payable to *Frances M'Kenna*,—*Edward Blake*, in case he should survive *Frances M'Kenna*, should take and receive the interest and dividends thereof during his life ; and after his death, the said *Mary M'Dermott* should take and receive the interest and dividends of the said undivided fifth part or portion of the said Bank stock, to her own use, during her life : and after the death of the survivor of *Frances M'Kenna*, *Edward Blake*, and *Mary M'Dermott*, in case the said *Edward Blake* and *Mary M'Dermott* should have issue male, that the principal of said one-fifth part or portion of said Bank stock should go and be applied in discharge of certain incumbrances on the lands conveyed by the settlement ; the trustees of the settlement taking an assignment of the same, in trust to secure the interest to *Mary M'Dermott* during her life, in case she should survive *Edward Blake*, to be in addition to her annuities thereinbefore mentioned ; and also to secure the interest of said charge to the survivor of *Edward Blake* and *Mary M'Dermott* : and, after the decease of the survivor of them, the principal sum of said fifth part or portion of said Bank stock, to the use of the issue female of the intended marriage, share and share alike : but in case of no issue of the intended marriage,

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1845. then to the use of the survivor of *Edward Blake* and *Ma*
 PLUNKETT *M'Dermott*, his or her executors, administrators, and :
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The marriage was celebrated ; and there was issue of two sons and one daughter, who were living.

At the time of making this settlement, the sum of 180*l.* 3*s.* 1*d.*, which had been invested in January, 1810 in the purchase of 249*l.* Three-and-a-half per cent stock constituted the only fund then existing as the produce of the surplus dividends.

By Indenture of the 19th of July, 1813, executed on the marriage of *Frances M'Dermott* with *Walter Henry Mansfield*, after reciting that *Frances M'Dermott* was, in her own right, possessed of 3846*l.* Bank stock, and a principal sum of 4500*l.* ready money ; and would be entitled upon the death of her mother, *Frances M'Kenna*, to receive one-fifth part or share of 7500*l.* Bank stock, then remaining in the Bank of Ireland in the names of Messrs *Plunkett*, *Byrne*, and *Laffan*, the interest or dividends upon which was payable in the manner mentioned and expressed in the deed of the 9th of August, 1809 ; and that, upon the treaty for the marriage, *Frances M'Dermott* had agreed that when and as soon as she should be entitled to receive said fifth part of said 7500*l.* Bank stock, the same should be transferred and made over to certain trustees therein named upon the trusts of the settlement ; it was witnessed that in pursuance of the agreement, and in consideration of the marriage, and of the said sum of 4500*l.* paid to *John Mansfield*, the father of *Walter Henry Mansfield*, and of the transfer of the 3846*l.* Bank stock, and of the fifth part

of said Bank stock, being the entire portion of the said *Frances M'Dermott*, and for granting a competent jointure and provision of maintenance for *Frances M'Dermott*, in case she should survive *Walter Henry Mansfield*, and for the other considerations therein mentioned, certain freehold estates, the property of the intended husband and his father, were limited to secure a jointure for the intended wife, and, subject thereto, in strict settlement. And as to "the said sum of 3846*l.* at present in Bank stock, and also the one-fifth of 7500*l.* to which the said *Frances M'Dermott* will be entitled on the death of her mother, *Frances M'Kenna*," it was agreed that the trustees should be possessed of same, upon certain trusts therein mentioned. In this declaration of trust, the trust fund was referred to as "the said Bank stock;" "the entire of said Bank stock of 3846*l.* and the said one-fifth of said 7500*l.*;" "the said sum of 3846*l.* Bank stock, and said one-fifth share or proportion of said 7500*l.* Bank stock, to which said *Frances M'Dermott* will become entitled upon the death of *Frances M'Kenna*, her mother;" "the said undivided fifth part or proportion of said Bank stock, being a sum of 7500*l.* now vested in the names of Messrs. *Plunkett*, *Byrne*, and *Laffan*, for the uses mentioned in the indenture of August, 1809." The settlement contained a power authorizing the investment of the trust-fund in the purchase of land: and it was provided that, in certain events, *Frances M'Dermott* should have power to charge such lands as should "by and with said Bank stock, or the produce thereof," be purchased, with the sum of 4500*l.*: and in case the 7500*l.* Bank stock should be invested in the purchase of lands, it was provided that *Frances M'Dermott* should have power, in certain events, to charge such lands with any sum not exceeding the value of "one-fifth part or pro-

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portion of said 7500*l.* Bank stock, or such sum as she shall or may become entitled to on account thereof, on the death of her mother."

The marriage was afterwards solemnized; and there was issue of it several children.

At the time when this settlement was made, the sum standing invested as the produce of the surplus dividends, amounted to 1077*l.* Three-and-a-half per cent. stock.

By Indenture of the 30th of March, 1834, after reciting that there was then vested in the Governor and Company of the Bank of Ireland the sum of 7500*l.* Bank stock, in the names of Messrs. *Plunkett, Laffan, and Byrne*, as trustees for *Frances M'Kenna*, the interest thereof for the use of *Frances M'Kenna*, during her life, and for other purposes; and that *Thomas M'Dermott* was entitled, after the decease of *Frances M'Kenna*, to one-fifth share of said sum of 7500*l.*; and that he had contracted with *Frances M'Kenna*, his mother, for the absolute sale of 750*l.*, being one-half of the said sum of 1500*l.* Bank stock as aforesaid, for the sum of 500*l.*; *Thomas M'Dermott*, in consideration of the sum of 500*l.*, bargained, sold, and assigned to *Frances M'Kenna* the said sum of 750*l.*, or one-half of said sum of 1500*l.* Bank stock, and all the estate, right, title, trust, property, equitable and reversionary, or other interest, claim and demand whatsoever, both at Law and in Equity, of him the said *Thomas M'Dermott*, of, into, or out of said sum of 750*l.* Bank stock, and every or any part thereof: to hold the said sum of 750*l.* Bank stock, and every part thereof, and all the reversionary interest and benefit thereof, unto the said *Frances M'Kenna*, her executors, &c., as fully and effectually, to all intents and

purposes, as he the said *Thomas M'Dermott*, his executors, &c., might or could hold and enjoy the same, if these presents had not been made.

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By another indenture, of equal date, *Thomas M'Dermott*, in consideration of 500*l.*, assigned, in like manner, the other moiety of his 1500*l.* Bank stock to *Anthony M'Dermott*, his executors, &c.

Frances M'Kenna died on the 13th of September, 1844 ; and upon her death the Bank stock which was so invested in the names of Messrs. *Plunkett*, *Byrne*, and *Laffan*, and the accumulations thereof, became divisible. In 1821, the Bank, under the authority of the 1 & 2 Geo. IV. c. 72, made an addition to their capital ; whereby the sum of 7500*l.* Bank stock became a capital sum of 9000*l.* Bank stock. The whole and to be distributed, comprehending Bank stock and other funds, was worth, at the price of the day, about 34,827*l.*

The bill was filed by the executors of the surviving trustee in the deed of August, 1809, setting forth the conflicting claims of the several defendants to the accumulations ; and praying that the rights of the several parties to the trust funds might be ascertained.

It was conceded that the accretion to the capital stock, made by the Bank in 1821, formed part of the principal of the trust fund, and was bound by the trusts of the settlements executed on the marriages of *Mary M'Dermott* and *Frances M'Dermott*.

Mr. *Moore* and Mr. *Sherlock* for the plaintiff.

Argument.

Mr. *Warren* and Mr. *Kellet* for *Mary Blake*, who survived her husband, *Edward Blake*, and claimed one-fifth of

1845. the accumulations in her own right. *Barclay v. Wai*
 PLUNKETT right(a), *Norris v. Harrison*(b).
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 Argument. Mr. Monahan and Mr. P. Blake for the children
Edward and Mary Blake. Courtney v. Ferrers(c).

Judgment. THE LORD CHANCELLOR :—

There is some difficulty in putting a construction on this settlement. The children of Mr. *M'Dermott* were, together with their mother, entitled in equal shares to a sum of 7500*l.* Bank stock, out of which an annuity of 56*l.* was payable to their mother during her life. The whole income arising from the Bank stock was more than was necessary for payment of the annuity; and the surplus was directed to be invested, to accumulate until the death of the mother. One of the daughters, being entitled to one fifth of the fund, and being about to marry, settled her one fifth of the 7500*l.* Bank stock, omitting to make mention of the accumulations, upon herself and the issue of her marriage. I see no reason to suppose that she did not intend to settle all the interest which she had in that fund; and I have no doubt that she did so intend; and if her present claim be well founded, it is by reason of an accidental omission in the settlement. She cannot claim the accumulations upon any intention either expressed or implied in the settlement; but only because they have been omitted from it.

Upon the division of the property amongst the children they set apart what they thought was necessary to answer

(a) 14 Ves. 66.

(b) 2 Mad. 268.

(c) 1 Sim. 137.

annuity. The nature of Bank stock made it impossible them to ascertain, prospectively, what precise sum would sufficient for that purpose; for, as the dividend in that k is not a settled one, the parties could not be certain the dividends would, in time to come, be sufficient to lue a particular annual sum. They therefore chose to a restraint upon themselves, with a view that the fund ld remain sufficient to pay the annuity, and that there ld not be a diminution of their capital; and they di- d that the surplus arising from this fund, after payment be annuity, should not be paid to themselves, but ld be invested, and so remain until the death of the an- nt. I do not find that the sum so to be invested was ted to be applied in payment of the annuity; but I t that must have been the intention, for they could had no other object. Shortly after this arrangement, *Blake* made the settlement in question, and by it d all her property in possession, and also assigned her ifth of this particular sum of Bank stock, but said ing of any accretion which might be made to the capi- am, nor of the savings which were so directed to be ted. The question then is, what construction am I ve to this settlement? I think that she meant to settle er Bank stock, and that there are sufficient words in ettlement for that purpose. The capital of the Bank . invested to answer the annuity, represents by inten- and by operation of law, not only all accretions made by bonus, but also all the surplus dividends and gs arising from that very stock. If the stock itself settled subject to the annuity, and no exception made of it, the settlement must have passed everything g from the fund. Mrs. *Blake* having put a prohi- 1 upon herself against receiving any of the dividends

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until her mother's death, the savings were during time forming a capital, which flowed from and was a portion of the very sum which was settled. I consider, therefore, that the settlement of the one-fifth of the 750 Bank stock, being the fountain from which everything flowed, includes in it all the accretions thereto. I do violence to the settlement by giving it that construction. It is, I admit, a liberal construction; but I am clear that, in giving it, I carry out the intention of the parties. Observe how anomalous the other construction would be. It is admitted that the accretion by way of bonus forms a portion of the capital. The savings are constituted principally of dividends arising from the bonus; so that by operation of law the bonus would form a part of the capital, though not so directed to be by the deed; and yet it is desired that the capital of the bonus should go in one way and the dividends thereon in another.

I am of opinion that the accumulations must be considered as forming part of the sum settled; and that the settlement of the principal sum carries with it all the moneys arising from it; and that the persons entitled under it are entitled to one-fifth of the fund as it now stands.

Argument.

Mr. Brooke and Mr. W. H. Griffiths for Mr. Mansfield who survived his wife, and claimed one-fifth of the accumulations, as her administrator. Attorney-General Poulteness (a).

Mr. Brewster for the children of Mr. and Mrs. Mansfield.

(a) 3 Ha. 555.

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It is easy to see from the deed of 1809, how the mistakes in these cases have arisen. It recites that it is agreed that the 7500*l.* stock should remain undivided as a fund. In that recital the parties deal with the 7500*l.* stock only, and they assume that the whole produce of the fund will be exhausted in paying the annuity ; and after the payment of the annuity it was to be in trust for the persons thereafter mentioned. If the accumulations were laid out in Bank stock, there would be no difficulty. I see no difference, because they happen to have been invested in Government stock : for the trustees had an option to invest either in Government or Bank stock, and they chose to invest in Government stock.

If the trade of the Bank had not been successful, and the dividends had become insufficient to pay the annuity, the whole of the fund must have been called back to pay the annuity. What then would have become of the 7500*l.* which was settled ? It would be necessary to answer the demand of the widow. All that I do is to say that the 7500*l.* stock represents the whole fund, and the recital shows that it does.

The settlement of 1813 shows that the parties were dealing with the entire interest in the fund. The savings were to be an addition to the fund, evidently for the purpose of securing the annuity in the first instance, and then to go with the original fund. The original fund represents everything ; and I think that, according to the intention

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of the parties, and the settlement of 1813, the words are sufficient to pass the entire interest in the fund.

Mr. Hartly and Mr. I. O'Callaghan for the children of Thomas M'Dermott, who, under the will of Francis M'Kenna, were entitled to the one-half of the one-fifth assigned to her by Thomas M'Dermott, and claimed a proportionate share of the accretion and accumulations.

Mr. J. J. Murphy for Robert Taffe and wife, in the same interest.

Mr. J. O'Brien and Mr. Scully for the administrator of Thomas M'Dermott.

Judgment. THE LORD CHANCELLOR :—

This question ought not to have come before me in the way it has ; and, if the parties desire it, they may file a bill to ascertain whether the purchaser is entitled to what she claims. [The claimants declined to file a bill.]

My opinion is, that the purchaser is not entitled to what she claims. The case is quite distinguishable from the former ones. My opinion in them was founded on this, that, considering the question of intention with reference to the instrument, the intention was to settle all that to which the parties were entitled. I think that those can admit of no other sound construction. But this is a case of a very different nature ; for here there is a specific co

tract, not for the whole, but for a particular portion of the fund, described as 750*l.* Bank stock; and it is measured, not by a consideration like marriage, which of itself is sufficient to cover any amount of property; but there is a specific price paid for a specific article, and I must consider the price as measured by that which on the face of the instrument is stated to be assigned. If a bill were filed, and the parties were to show what the real contract was, perhaps I should be of a different opinion; for then the intention of the parties would be shown: but here, as far as the object of the parties appears, this is a sale of a reversionary interest in a sum of 750*l.* Bank stock, for 500*l.* The subsequent general words are ambiguous, and may be used either way: a man who buys must tell distinctly what it is he has purchased. Therefore, as the consideration for this purchase is measured by value and not by marriage, which covers any amount, and in which you may look at the general terms of the deed, I cannot hold that the purchaser was purchasing not only the 750*l.* stock, but also the different accretions which should be produced by it.

I have, therefore, no difficulty in holding that the purchaser is not entitled to anything save 750*l.* Bank stock. There is some difficulty as to the bonus; for I should hold that if a man sold Bank stock, and that afterwards and before the transfer, a bonus was given upon that stock, the seller could not claim it; for it is given to the person who is the owner of the Bank stock at the time: it follows the ownership. But this is the case of a sale of a particular sum of stock, out of a reversionary interest in Bank stock; and the purchaser was not entitled to call for a transfer at the time when the bonus was declared. I think that as Mrs.

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M^cKenna purchased only 750*l.* stock, she is not entitled to the bonus. I would be of a different opinion if this were the case of a person entitled to the entire produce of a lease, or of a person selling the whole of his reversionary interest: but in this case stands, I think the purchaser is entitled to the Bank stock, and no more.

MOLESWORTH, Administrator of *M^cCRAIGHT*
v. ROBBINS.

HODGENS v. PERCIVAL and MOLESWORTH.

May 8.

No one can give a lien on deeds to a solicitor of a higher nature than the interest he himself has in the deeds.

By settlement of 1780, *D.*, seised *quasi* in fee, charged the lands with 2500*l.* for his children. On his death, the inheritance descended upon his son *R.*, who was also entitled to a portion of the charge. *R.* retained *M.* as his solicitor; who, in the lifetime of *R.*, instituted a suit in his name to raise the charge. That suit having abated by the death of *R.*, *M.*, as the administrator of *R.*, and the other persons entitled to the residue of the charge, instituted another suit, as co-plaintiffs, to raise its amount; and *M.*, as solicitor, conducted that suit for the co-plaintiffs. In the course of his professional employment, title deeds relating to the estate and the charge came into his possession. A receiver was appointed in the suit, but no decree was obtained therein. The lands were afterwards sold under a decree in the suit of a *puisne* judgment creditor of *D.*; and *M.* was ordered to deliver up and lodge the title deeds, without prejudice to his lien; which he did.

Held, That *R.*, as owner of the inheritance, could not give *M.* a lien for costs on the residue of the estate, as against the persons entitled to the charge. That *R.*, as owner of a portion of the charge, could not give *M.* a lien on the deeds of the charge, as that deed belonged to him in common with the other persons entitled to the charge, and not to him solely.

That the lien of *M.* on the deeds evidencing the title of his clients to the charge, was transferred to the sums decreed to them in respect thereof.

That the lien of *M.* on the deeds evidencing the title of his clients to the charge, was transferred to the sums decreed to them in respect thereof.

administrators, and assigns, for the term of 1000
 his undivided moiety of the lands of Loughloher,
 the same for the term of 1000 years ; upon trust, by
 mortgage of the term, to raise the sum of 2500*l.*,
 to pay the same out at interest, and pay the interest
 to *Donagh M'Craight*, for his life ; and after his de-
 cease he should leave children of the marriage, and
 if *Bunbury* should survive him, in trust to pay her,
 the interest, a yearly sum of 60*l.* ; and, subject thereto,
Donagh M'Craight should die leaving one or more
 children of the marriage, to assign and pay over to
 the children, if more than one, the said sum of 2500*l.*, in
 equal shares and proportions as *Donagh M'Craight* should
 have appointed ; and, for want of such appointment,
 to be divided into equal shares.

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marriage was celebrated ; and there was issue
 of children only, namely, *Robert* and *Elizabeth*
M'Craight.

On the 11th of November, 1805, executed
 the marriage of *Elizabeth M'Craight* with *William*
Percival, *Donagh M'Craight*, by virtue of the power con-
 tained in the articles of 1780 and with the consent of
Percival and *Elizabeth M'Craight*, appointed the
 1500*l.*, part of the said sum of 2500*l.*, to be paid
 to the trustees of the settlement on the day after the de-
 cease of *Donagh M'Craight*, with interest thereon from
 that day ; upon trust to lay out the same in the pur-
 chase of real estates of inheritance, to be held to the use of
 the said *Elizabeth* for life, for her separate use ; remainder to the
 said *William Percival* for his life ; and after his decease
 to be divided into equal shares, and to be appointed by *William Percival* during
 his life.

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the joint lives of himself and *Elizabeth M^cCraight*, or *By Elizabeth M^cCraight*, if she survived him), to the use of the children of *William Percival* and his intended wife, equally to be divided between them as tenants in common, in tail general; with divers limitations over. And it was declared that, until the 1500*l.* should be laid out in the purchase thereby directed to be made, the interest thereof should be received by such persons as should respectively be entitled to receive the rents of the lands to be purchased.

Elizabeth Percival afterwards died in the lifetime of *Donagh M^cCraight* and of her husband, leaving one son, *William B. Percival*, and two daughters, the only issue of the marriage, her surviving. In 1821 *William Percival* obtained administration to her. He died in 1833, intestate, and without ever having exercised the power of appointment vested in him; and *William B. Percival*, his only son, obtained administration to him, and also administration *de bonis non* to his mother, *Elizabeth Percival*, otherwise *M^cCraight*.

Donagh M^cCraight died in May, 1816, without having made any further appointment of the said sum of 2500*l.*, intestate, leaving his wife and *Robert M^cCraight*, his only son and heir at law, him surviving. At the time of his decease he was much embarrassed in his circumstances, and was not possessed of any personal property, or of any real or freehold estate other than the moiety of the lands of Loughloher, which were then in possession of two creditors of his, named *Robbins* and *Mansergh*, under grants in custodiam. The custodees remained in possession thereof during the life of *Robert M^cCraight*, and down to the year

1822, when they were dispossessed by the receiver of the Court, appointed in the cause of *Molesworth v. Robbins*.

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In 1814 *Robert M'Craight* married *Anne Bunbury*; and shortly afterwards went to India, accompanied by his wife, where he died, on the 2nd of November, 1819, leaving his wife and one son, *William B. Le Hunt M'Craight*, his only child, him surviving. By his will, which was not executed so as to pass real estate, he gave all his property of every kind to his wife during her life; and after her decease to his son, *William B. Le Hunt M'Craight*. This will was not discovered until some time after the decease of *Robert M'Craight*.

Hickman B. Molesworth had been the agent and solicitor of *Robert M'Craight*; and on the 29th of June, 1821, he obtained administration to him, limited to continue and be in force only during the absence of *Anne*, the widow of *Robert M'Craight*. She died in India without having ever returned to Ireland; and the will of *Robert M'Craight* having been discovered and transmitted to this country, administration with the will annexed was granted to *Edward Gill*, a defendant in the second cause.

William B. Le Hunt M'Craight died in August, 1839, intestate, unmarried, and without issue: and upon his decease, the freehold interest in the lands of Loughloher descended upon *William B. Percival*, as his heir at law.

The cause of *Hodgens v. Percival* was a suit instituted by a judgment creditor of *Donagh M'Craight*, for an account of his real and personal assets, and for a sale. By a decree to account made in that cause, on the 3rd of Fe-

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 —
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bruary, 1835, it was, amongst other things, referred to the Master to inquire whether *Robert M'Craight* was, at the time of the death of *Donagh M'Craight*, entitled to any and what share of the sum of 2500*l.* charged by the marriage settlement of October, 1780; and whether any and what sum remained due to the personal representative of *Robert M'Craight*, on foot thereof. And it was further ordered, that the defendant, *Hickman B. Molesworth*, should bring in and lodge in the office of the Master, but without prejudice to whatever lien he might have thereon (if any he had), all such deeds, documents, and muniments of title, in his power or possession, relating to the lands and premises in the pleadings mentioned, and all such vouchers in his possession relating to the demands of the creditors of *Donagh M'Craight*, as the Master should direct or deem proper or necessary to have lodged for the purpose of taking the accounts or answering the inquiries directed by the decree.

The Master made his report, dated the 23rd of December, 1840, and thereby found that there was due to *Edward Gill*, as administrator of *Robert M'Craight*, on foot of one moiety of the unappointed sum of 1000*l.*, part of the said sum of 2500*l.*, the principal sum of 500*l.*, late currency, together with an arrear of interest thereon, amounting in the whole to 844*l.* 5*s.* 7*d.*; and that the same was so due to him in trust for the personal representative of *William B. Le Hunt M'Craight*, who, as sole next of kin of *Robert M'Craight*, was entitled thereto: and that there was due to *William B. Percival*, as administrator *de bonis non* of his mother, *Elizabeth Percival*, the like sum of 844*l.* 5*s.* 7*d.*, on foot of the other moiety of the said unappointed sum: and that the said sum of 2500*l.* was the first charge on the lands.

Master further reported, that *Hickman B. Molesworth*, in obedience to the decree, lodged in his office several title deeds, documents, and vouchers specified in the schedule ; amongst which were the articles of the 22nd of November, 1780, and the settlement of the 11th of November, 1785 ; and that he so lodged them subject to the lien claimed to have on them, and on the said charge of the estate, under the following circumstances, viz. :

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Robert M'Craight, in April, 1814, executed a general power of attorney to *Hickman B. Molesworth*, authorizing and empowering him to act for him in all matters ; and afterwards went to India, where he died.

On the decease of *Donagh M'Craight*, *Robbins* was in possession of the rents of part of the lands, as custodee ; and the full rent of the lands having been permitted to run out of year, the head landlord brought an ejectment for non-payment of rent ; and also served a notice requiring the tenant thereof to renew the lease, some of the lives having expired ; and *Hickman B. Molesworth*, as agent of *Robert M'Craight*, who, as heir at law of *Donagh M'Craight*, was entitled to one moiety of the lands of Loughloher, procured the ejectment of the occupying tenants of the lands, and from *Thomas M'Craight*, the owner of the other moiety, the funds necessary for the payment of the renewal fines and the arrears of rent ; by means of which exertions the renewal was effected, and the interest of *Robert M'Craight* in the lands was preserved.

Hickman B. Molesworth also, as the agent and solicitor of *Robert M'Craight*, and acting under the power of attorney, on the 19th of April, 1817, filed a bill in this

1845. Court, in the name and on behalf of *Robert M'Craig* against *Robbins, Mansergh*, and others, asserting and w
 MOLESWORTH the object of establishing the right of *Robert M'Craight*
 v. ROBBINS. a portion of the said sum of 2500*l.*, and in order to preser
 ——— his interest in the lands against *Robbins* and *Mansergh*
 Statement. and, accordingly, praying for a receiver over the lands.
 receiver was appointed in that suit ; but before any effectu
 proceeding was had in the cause, *Robert M'Craight* die
 and the suit abated.

After the decease of *Robert M'Craight*, *Hickman Molesworth*, claiming as his administrator to be entit
 to a share of the charge of 2500*l.*, and *William Percie*
 in his own right, and as the administrator of his w
Elizabeth, and their children, who were then minors (be
 the several persons interested in the charge), filed th
 bill in the year 1821, in this Court, against *Robb*
 and others, for the purpose of raising the said charg
 and *Hickman B. Molesworth* conducted that cause as a
 citor on behalf of himself and the other plaintiffs, w
 the 28th of November, 1823, when he ceased to act
 solicitor therein ; and from thenceforth *William M'D*
mott acted as solicitor for the plaintiffs in that suit.
 that cause an order for the appointment of a receiver
 made on the 30th of July, 1822 ; the receiver was sub
 quently appointed; and was, in 1833, extended to the seco
 cause ; and the rents brought in by him in the first cau
 which were considerable, were transferred to the credit
 both causes.

Under these circumstances, *Hickman B. Molesworth*
 claimed the several liens after-mentioned, viz. : (1) as ag
Edward Gill, as administrator of *Robert M'Craight*,

lien upon the several deeds and documents so lodged by him, and upon the sum reported to *Edward Gill* as such administrator, on foot of *Robert M'Craight's* share of the charge of 2500*l.*, for the expenses incurred by him in obtaining the letters of limited administration of the estate and effects of *Robert M'Craight*; which amounted to 27*l.* 5*s.* 1*d.*: (2) and to a like lien for his costs incurred in the cause of *M'Craight v. Robbins*, instituted in the life-time of *Robert M'Craight*, as before mentioned; which amounted to 12*l.* 15*s.* 8*d.*: (3) and he further claimed to be entitled, not only as against *Edward Gill*, as such administrator, to a lien on the said several deeds and documents, and on the sum reported due to him, on foot of *Robert M'Craight's* share of the charge of 2500*l.*, but also as against the defendant, *William B. Percival*, as administrator of his father, *William Percival*, and also as administrator *de bonis non* of his mother, *Elizabeth*, to a lien not only upon the said deeds and documents, but also upon the sum reported due to *William B. Percival*, as such administrator of his father, on foot of his father's interest in the charge of 2500*l.*, and upon the sum reported due to *William B. Percival*, as administrator *de bonis non* of his mother, on foot of her interest in the said charge, for the costs incurred by him, *Hickman B. Molesworth*, and afterwards by *William M'Dermott*, in and about the prosecution and conduct of the suit instituted in the year 1821, by *Hickman B. Molesworth*, *William Percival*, and the minor children of *William Percival*; which costs amounted to 243*l.* 11*s.* 3*d.*

The Master reported that he had not taken on himself to decide, and submitted to the Court whether *Hickman B. Molesworth* was entitled either for the expenses incurred by him in obtaining the said limited administration to *Robert*

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M^cCraight, or for any part of the costs incurred by or behalf of the plaintiffs in the said several causes, to the several liens so claimed by him in respect thereof, or any of said last mentioned liens against the parties against whom he claimed the same, or against any of them : and if so, in what proportions the parties liable to or bound by such liens or any of them were so liable respectively.

By decree of the 22nd of February, 1841, the report was confirmed ; and the consideration of the special points submitted by the Master, as to the right of the defendant, *Hickman B. Molesworth*, to the several liens mentioned in the report, was reserved ; with liberty to apply.

The lands having been sold under the decree, it was, by an order of the 12th of December, 1843, referred to the Master to allocate the funds in Bank to the credit of these causes, according to the rights of the parties under the decree of 1841 ; said order to be without prejudice to the rights of *Hickman B. Molesworth*, as reserved by that decree. The Master made his report, dated the 31st of January, 1845 ; and thereby allocated the funds in Court in payment, *inter alia*, of the sums reported due to *Edward Gill* and *William B. Percival*, and the several persons entitled to portions of the charge of 2500*l*.

The plaintiff in the second cause moved at the Rolls, that the funds in Court should be paid out and transferred, pursuant to the allocation report ; and that the title deeds lodged in Court should be handed over to the purchaser and a cross-application was made by *Robert Molesworth* the executor of *Hickman B. Molesworth*, who had died, that so much of the stock as had been allocated to *Edward*

Gill, as should be equivalent to the costs of procuring the aforesaid renewal of the lands (which the Master had reported that *Hickman B. Molesworth* was entitled to), and the costs of procuring the limited administration to *Robert M'Craight*, and the costs in the cause of *M'Craight v. Robbins*, amounting together to the sum of 227*l.* 0*s.* 11*d.*; and also that so much of the funds allocated to *Edward Gill* and to *William B. Percival*, as administrator of his father and administrator *de bonis non* of his mother, as should be equivalent to the sum of 243*l.* 11*s.* 3*d.*, the costs in the cause of *Molesworth, Administrator of M'Craight and Percival, v. Robbins*, should be transferred to the said *Robert Molesworth*.

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The Master of the Rolls made an order pursuant to the cross-application of *Robert Molesworth*, as far as it related to the costs of the renewal, and of obtaining the limited administration to *Robert M'Craight*, but refused the rest of the application(*a*); and directed that the residue of the stock allocated to *Edward Gill* should be transferred to credit of the second cause, and the matter of *Calders, Minors*; and that the stock allocated to *William B. Percival* should be transferred to the credit of the cause of *Atkins v. Percival*: and ordered that the title deeds should be delivered to the purchaser.

Robert Molesworth now moved, by way of appeal from the order of the Master of the Rolls, that the Accountant-General should transfer to him so much of the Government stock allocated to *Edward Gill*, and by said order directed to be transferred to the credit of the second cause and the matter of *Calders, Minors*, as would be equivalent to the

(*a*) See *Molesworth v. Robbins*, 7 Ir. Eq. Rep. 1.

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sum of 128*l.* 15*s.* 8*d.*, the costs in *M'Craight v. Robb* and should also transfer to him so much of the Government stock allocated to *Edward Gill* and to *William B. Percival*, as administrator of his father and administrator *bonis non* of his mother, and by said order directed to be transferred respectively to the credit of the second cause and the matter of *Calders, Minors*, and the cause of *Atkins v. Percival*, as would be equivalent to the sum of 243*l.* 11*s.* 3*d.*, the costs of the first cause; or that said order might be reversed so far as related to said transfers, and varied by directing that *Edward Gill* and *William B. Percival* might be restrained from setting up the Statute Limitations as a defence to any proceedings which might be taken by *Robert Molesworth*, or the solicitor for plaintiffs in the first cause, for the recovery of the said demands, further than they might have done at the date of the final decree in the second cause: or that the proof of demand of *Hickman B. Molesworth*, made in the second cause against *William B. Percival*, might be transferred to the cause of *Atkins v. Percival*.

Argument.

Mr. Francis Fitzgerald and Mr. Monahan, for *Robert Molesworth*, distinguished this case from *Bozon v. Land*(a) and *Blunden v. Desart*(b), as in those cases the solicitor voluntarily produced the deeds, and then attempted to enforce his general lien against the fund real thereby: whereas, in the present case, Mr. *Molesworth* produced the deeds under the compulsion of the decree of the Court, which expressly saved his lien on them, if he had; and, therefore, the case was to be considered as if the deeds were still in his possession, and the parties against whom he claimed his lien were now seeking

(a) 4 M. & C. 354.

(b) 2 Dru. & War. 405.

have them transferred to the purchaser, which was resisted by him. And as to *Taylor v. Gorman*(a), they said that its authority depended upon the former cases ; and, though affirmed by the Chancellor, it was upon another ground than that taken by the Master of the Rolls. They also argued that, although, perhaps, neither *Robert M'Craight* nor *William B. Percival* could give Mr. *Molesworth* such a lien on the deeds as would authorize him to refuse producing them for the inspection of the other persons interested in the charge of 2500*l.*, yet they could give a lien on them which would authorize the solicitor in refusing to part with them to a third person ; for the other parties interested in the 2500*l.* could not compel them to deliver the deeds to third parties : and they relied on *Worrall v. Johnson*(b), as establishing that, under the circumstances of the case, the lien on the deeds was transferred to the fund recovered.

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Argument.

Mr. Deasy for Edward Gill.

Mr. Sergeant Warren and Mr. Wall for Atkins and wife.

Mr. Hughes and Mr. Mara for the next of kin of William B. Le Hunt M'Craight.

Mr. Monahan, in reply, said, that, at all events, *Mr. Molesworth*, as one of the co-plaintiffs in the cause of *Molensworth v. Robbins*, was entitled to his costs in that cause out of the funds realized by the receiver in it ; which had been since transferred to the credit of both causes, and paid out, pursuant to the decree of 1841, to the parties, on account of their costs.

(a) 6 Ir. Eq. Rep. 330.

(b) 2 J. & W. 214.

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THE LORD CHANCELLOR :—

This case proves what I have always thought, that the question of lien of a solicitor on deeds ought to be decided at the earliest opportunity. As this case was opened before me, it was a mere question of lien ; not of the right of Mr. *Molesworth*, as one of the plaintiffs in the first cause, to the costs in that cause, but a question of his lien for those costs as the solicitor of *Robert M^c Craight*. It was not attempted to prove first that he had a lien upon the fund, and therefore that the deeds could not be taken from him ; but it was argued that the deeds could not be taken from him, on the ground that he had a lien on them. The nature of a solicitor's lien is now well understood ; and it does not appear to be of the nature of a charge upon the fund. When Mr. *Molesworth* advanced his money and saved the estate from being evicted by the landlord, he obtained an actual right to a charge on the property to that extent ; not simply on the deeds, but upon the estate itself, and against every person interested in it ; and that right he might enforce by suit in Equity : whereas the solicitor's lien on deeds is simply a right to withhold them. The solicitor could not file a bill to enforce such a lien ; he could only withhold the deeds, so as to prevent the party entitled from having the benefit of them. Now, observe what would be the consequence of allowing the claim of Mr. *Molesworth* in this case. *Robert M^c Craight* was interested in the estate in two different rights : First, he was entitled to the *quasi* fee simple of the estate ; secondly, he was entitled to a portion of a sum of 2500*l.*, which was the first charge on the estate : and there being a number of other incumbrances upon the estate, he elected to claim as an incumbrancer, the estate itself not being of sufficient value to pay the charges on it. But that

ould not divest him of his title as owner of the inheri-
 , holding the title deeds. Could he either withhold
 ate itself, or the deeds, from the person entitled to the
 brance, which had been charged on the property by
 nder whom he derived the estate? The moment the
 : was created, the covenant which created it and bound
 ate, equally bound the deeds; and the persons enti-
 the charge had a right to enforce the payment of
 nst the inheritance and the inheritor holding the deeds,
 were the evidence of the title to the estate so charged.
 t *M'Craight* had a common, not a superior right,
 he persons entitled to the residue of the charge; and
 persons had altogether a right against himself as in-
 r of the estate. The claim to the title deeds of the
 . was by all the persons entitled to the charge against
 ' them, who was himself entitled to the estate charged.
 ould not, in his separate character of owner of the
 , withhold the deeds from the persons entitled to the
 ; then, could he, as being entitled to a portion of
 arge, and also to the inheritance, withhold them?
 was the charge to be enforced but by sale and con-
 ce of the lands with the title deeds? No man can
 lien to a solicitor, of a higher nature than the interest
 nself has in the deeds; and as he himself must have
 red over the deeds to the persons entitled in common
 himself to the charge, so must *Mr. Molesworth*.
 fore, I do not think that the decision of the Master
 Rolls is faulty, as regards the rights of the claimants
 the decree; and I am of opinion that *Mr. Moles-*
 had not the right which he claims. But then, it was
 hat *Mr. Molesworth* had a lien on the deeds, in respect
 right which *Robert M'Craight* had to deposit them,
 uch as he was entitled to a portion of the charge of
 . But that is the fallacy. He had no such right.

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Robert M' Craight had a right to charge his portion of the 2500*l.*; but he had no right to charge the deeds, which ~~do~~ not belong to him alone, but to himself in common with others, and which he could not withhold from the class of persons entitled to them. Upon that simple ground, I think the decision is right. The form of the notice is, in itself, fatal to this argument; for it does not object to the deeds being handed over to the purchaser: and Mr. *Molesworth* could not object to their being delivered to him, for he was plaintiff as well as solicitor, engaged in a suit to raise this charge, and for the sale of this very estate; and how could he withhold those deeds from the purchaser in another cause, in which he was a party defendant, and which was instituted because he did not prosecute his suit, when he himself, by his own bill, prayed such relief as would have compelled him to produce these deeds? The form of the notice is, therefore, fatal to the application; for I am not asked to reverse that part of the order which directs the deeds to be given to the purchaser; but I am required to transfer the lien from the deeds to the fund decreed to be paid to *Robert M' Craight*. Now, this Court will not wantonly interfere with the lien of a solicitor, and if he really has a lien, it will not compel him to part with the deeds, until the persons wanting them pay him the money secured by the lien. But the circumstance of his being a plaintiff in the first cause relieves the case of any difficulty in this respect. It seems to me, therefore, that the order of the Master of the Rolls is right.

Then it was said, but only in reply, so that I could not act upon it without further argument, that the right of Mr. *Molesworth* accrued in another way; that, being one of the plaintiffs in the first cause, and being the solicitor for himself and his co-plaintiffs, he was entitled to

paid his costs out of the fund realized in that cause. One objection to that claim is, the way in which he has conducted himself as solicitor in that cause. He has also allowed the funds brought in in that cause, and which, perhaps, might have been made available for the payment of his costs, to be paid out of Court ; and, supposing that this has been done to the damage of the other parties, that would be an answer to this claim. But I am not certain of that ; nor whether the Court would not give him relief, if he had the right and there had been no improper application of the funds. The ground now put forward is, that in that suit he was entitled to have the funds secured for his lien. It is plain, if he had come in in proper time, when the costs of the judgment creditor, the plaintiff in the second suit, were provided for, and had asked for his costs upon the ground that it was by means of his suit that the receiver had been appointed, by whom the funds had been brought in, the Court would, as a matter of course, have given him his costs, unless it had been of opinion that he had forfeited his right by neglecting the prosecution of the cause ; and I think that Mr. *Molesworth* must have entertained some such apprehension, otherwise he would, at that time, have applied for his costs. I am asked to remove the impediment of the Statute of Limitations out of the way of Mr. *Molesworth* in order to enable him to establish his claim at Law. I do not think that the point with respect to the claim of Mr. *Molesworth* to the assets as co-plaintiff was distinctly before the Master of the rolls ; for it is stated that he gave to Mr. *Molesworth* the assets of taking out administration ; and it would be rather singular to give him the costs incurred for the purpose of instituting the suit, and not give him the costs properly incurred by him in prosecuting that suit as administrator. I

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 ───
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do not quite understand that part of the case. What I propose, therefore, to do, as far as the case is before me, is to affirm the order of the Master of the Rolls, without costs, and I shall give liberty to the parties to apply to the Master of the Rolls as to the right of Mr. *Molesworth* to be paid any costs, not as the solicitor, but as the plaintiff in that suit which he instituted under the letters of administration, the costs of obtaining which have been already allowed to him.

JOYCE *v.* DE MOLEYNS.

April 24.
 A purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title.

THE Hon. *Frederick Mullins*, by his will, dated the 13th of June, 1825, devised all his right, title, and interest in the impropriate tithes of Kilcolman, to his second son *William*, for his life, with divers limitations over to his issue; and died in 1832.

At the time of making his will, the testator was entitled to an equitable estate in fee simple in the tithes of Kilcolman: the legal estate in fee was conveyed to him by indenture of the 12th of December, 1827.

Upon the decease of the Hon. *Frederick Mullins*, administration, with his will annexed, was granted to his eldest son and heir at law, *Frederick William Mullins* who, with his brothers and sisters, afterwards, by royal license, assumed the surname of *De Moleyns*. He obtained possession of the title deeds of several of the estates, the property of his father; and, amongst others, of the conveyance

ance of the 12th of December, 1827; and in the month of October, 1840, he applied to Sir *E. Antrobus* and *Edward Majoribanks*, bankers in London, to advance him a sum of 1000*l.*; which they accordingly did, upon the security of the promissory note of *Frederick William De Moleyns*, and upon his depositing with them the deed of the 12th of December, 1827, by way of equitable mortgage. This deposit was made without the knowledge of *William De Moleyns*, who, from the decease of the testator, had been in possession of the impropriate tithes of Kilcolman, and who had frequently applied to *Frederick William De Moleyns* for the deed, but could not obtain it.

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In 1842, Sir *E. Antrobus* and *Edward Majoribanks* filed their bill against *Frederick William De Moleyns* alone, for a sale of the impropriate tithes of Kilcolman, and for payment of the mortgage debt out of the produce of the sale. A final decree for a sale was pronounced in that cause, in March, 1844.

The present bill was filed in 1843, by *John Joyce*, administrator of *James Parker*, a bond creditor of the Hon. *Frederick Mullins*, for an account and administration of his real and personal estate. He charged by his bill, that the deposit of the deed conveying the tithes to the Hon. *Frederick Mullins* could not give any title to Sir *E. Antrobus* and *Edward Majoribanks* as against the tithes or the deed, inasmuch as *Frederick William De Moleyns* had no title either to the tithes or the deed, and had no authority to deposit the same: and prayed that Sir *E. Antrobus* and *Edward Majoribanks* might be decreed to deliver up any deed in their possession, relating to the title to the impropriate tithes, discharged from any claim thereupon.

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Sir *E. Antrobus* and *Edward Majoribanks*, by their answer, said, that at the time they made the advance to *Frederick William De Moleyns*, he represented that he was entitled to the impropriate tithes as the heir at law of his father; and they insisted that they were purchasers for valuable consideration without notice of the will of the Hon. *Frederick Mullins*, or of the title of any person claiming thereunder the tithes in question, or of the demands of the plaintiff: and submitted that the bill should either be dismissed against them, or that the plaintiff should redeem them.

There was no evidence of notice.

Argument. Mr. *Pigot*, Mr. *Deasy*, and Mr. *D. Lane*, for the plaintiff.

Mr. *Brooks* and Mr. *S. Miller* for Sir *E. Antrobus* and *Edward Majoribanks*.

Although it appears that *Frederick William De Moleyns* had no title to the tithes, and that the mortgagees have no defence, at law, to an action for the deed, yet, being purchasers without notice, a Court of Equity will not order them to deliver up the deeds. *Jerrard v. Saunders*(a); *Senhouse v. Earl*(b); *Hoare v. Parker*(c); *Sweet v. Southcote*(d); *Plum v. Fluitt*(e). The bill ought, therefore, to be dismissed.

Mr. *Deasy* in reply.

The bankers took the equitable mortgage from a person who was not then nor ever had been in possession of the

(a) 2 Ves. Jun. 454.

(b) 2 Ves. 450.

(c) 1 Cox, 224.

(d) 2 B. C. C. 66.

(e) 2 Anst. 432.

tithes. But, admitting that they are equitable mortgages, the plaintiff is entitled to keep them before the Court; under the decree in the cause they will get whatever they are entitled to.

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Argument.

THE LORD CHANCELLOR :—

In this case, the question as to the right of a person claiming as a purchaser without notice to hold title deeds, in respect of which the person depositing them had no interest in the estate, seems to arise. The heir at law of the person entitled to the tithes in question acquired possession of the title deeds; and he obtained an advance of 1000*l.* from certain bankers in London, upon a deposit of the deeds with them. The *bona fides* of that transaction is not impeached. The bankers have been made defendants in this suit; and they swear that they advanced their money without notice, and claim to retain possession of the deeds as purchasers for value without notice.

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It is clear that the persons entitled to the tithes may maintain trover for the deeds. There is no question as to their title to recover at law; but I apprehend that the defence of a purchase for value without notice is a shield as well against a legal as an equitable title. There has been a considerable difference of opinion upon the subject amongst Judges: I must decide the question for myself; and I have always considered the true rule to be that which I have stated. Therefore, I think that the mere circumstance that this is a legal right, is not a bar to the defence set up, if in other respects it is a good defence. That it is a good defence cannot be denied. Suppose a tenant for life under a will, with remainder over; and that the tenant for life,

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being the heir at law of the testator, conveys the inheritance to a purchaser without notice, the remainder-man cannot have any relief in Equity against the purchaser. He must establish his title, outside of this Court, as well as can. It is the same with respect to title deeds. Deeds and chattels; and, where no adverse claimant interferes, the person entitled to the estate is entitled to the deeds. But a person who has possession of the deeds may deal with them as with any other chattels, subject to the rights of those who are interested in them. Here a person obtains possession of title deeds, having no title to the estate; and another person advances money to him upon the security and deposit of the deeds. The rule, therefore, comes into operation (for it applies equally to real estate and to chattels) that if a man advance money, *bonâ fide* and with notice of the infirmity of the title of the seller, he will be protected in this Court, and the parties having title must seek relief elsewhere. It may be true that there is no rule in terms applying that rule to the deposit of title deeds, but I think that Lord *Eldon*, in a case which came before him, expressed an opinion that the defence was a good one in such a case.

In answer to the objection made by the defendants it is urged, that they are equitable mortgagees, and brought before the Court in that character; and that the Master will, under the decree, report on their title; and so they may, under the decree, have what is their right. This, however, is merely begging the question; for if their status as purchasers for value enables them to say that the title must be dismissed as against them, then the plaintiff gets nothing; for he says that the person who deposited the deeds had no interest of any kind in the estate: that

fore, though the plaintiff treats them as equitable mortgagees of the estate, yet at the hearing he denies them that character; and they cannot fill the character of equitable mortgagees of the deeds, for the person depositing them had no title. The defendants, therefore, use the possession of the deeds, as they have a right to do, as a shield to protect them against the plaintiffs: they can make no use of the deeds themselves; they cannot maintain possession of them against the true owner; but in this Court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them *bond fide* and without notice. The bill must, therefore, be dismissed against them with costs.

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Judgment.

THE LORD CHANCELLOR :—

I find that Lord *Eldon* decided the very point in this case, in *Wallwyn v. Lee*(a). There the plaintiff was in possession of the estate, and filed his bill for the delivery of the title deeds, against the defendant, a mortgagee of a tenant for life of the estate, who pleaded that he was a purchaser for value, without notice. There was a question in that case, whether the plea was available by a purchaser who had not been put into possession of the estate: but in this case possession could not be given, for tithes are an incorporeal hereditament. I therefore think that the answer of the defendants contains sufficient averments.

April 25.

In *Bernard v. Drought*(b), Sir *A. Hart* extended the doctrine to the case of a solicitor's lien: but in *Smith v. Chichester*(c) I considered that he had carried it too far. The decree I made is therefore to stand(d).

(a) 9 Ves. 24.

(b) 1 Moll. 38.

(c) 2 Dru. & War. 393.

(d) See *Bowen v. Evans*, ante, vol. i. 178.

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April 25.

May 8.

COCHRANE v. O'BRIEN.

John lodged 130*l.* in a Bank, in his own name, upon a deposit receipt. Afterwards, *Daniel*, by the direction of *John*, lodged an additional sum of 5*l.* in the Bank, and obtained a new deposit receipt for 135*l.* in the name of *Catherine*; and the old receipt was cancelled. *John* died; and *Daniel*, as his administrator, claimed the money, alleging that the gift to *Catherine* was incomplete, and that he had taken the receipt in the name of *Catherine* without the directions of *John*; and he refused to give *Catherine* the deposit receipt, and required the Bank to pay him the money. *Catherine* also demanded the money of the Bank; which

they refused to pay, as she had not the deposit receipt. Both *Catherine* and *Daniel* commenced actions against the Bank, who filed a bill of interpleader against them.

This is not the case of a double demand for one duty, but it is a case in which there may be two liabilities. The bill was, therefore, dismissed.

A mere pretext of a conflicting claim will not support a bill of interpleader: the Court is bound to see that there is a question to be tried.

When a bill is dismissed, the Court cannot decree the costs to be paid by a defendant. ^{whose} misconduct occasioned the suit.

IN 1840, *John O'Brien*, the father of the defendants, *Daniel O'Brien* and *Catherine Callaghan*, lodged the sum of 150*l.* in the Kanturk branch of the National Bank of Ireland, upon a deposit receipt, in his own name. On the 15th of December, 1840, *Daniel O'Brien* produced the deposit receipt, endorsed by his father, to the manager of the Bank, and required payment of the interest due thereon, but was then informed that payment would only be made to *John O'Brien* in person; in consequence whereof *John O'Brien*, accompanied by his son, *Daniel*, came to the Bank on the 19th December, 1840, and drew the interest, and the sum of 20*l.*, part of the principal money; and he then obtained, in his own name, a new deposit receipt for the balance, 130*l.* In February, 1842, *John* and *Daniel O'Brien* came to the Bank and received the interest on the 130*l.*; and the old deposit receipt was then cancelled, and a new one for 130*l.* was given to *John O'Brien*. Upon that occasion *John O'Brien* requested Mr. *Palmer*, the manager of the Bank, to dispense with his personal attendance (as he was old and feeble), in case he should in future want to draw money out of the Bank, and to make the payments to his son, *Daniel*, upon his producing the deposit receipt; which request was complied with. In July, 1842, *Daniel*

O'Brien went to the Bank, produced the deposit receipt issued by his father, obtained payment of the interest then on the sum deposited, and took back a new deposit receipt in the name of *John O'Brien*. Again, on the 19th of January, 1843, *Daniel O'Brien* brought the last-mentioned deposit receipt to the Bank, endorsed by his father, and received the interest : he lodged 5*l.* in the Bank, and took out a new deposit receipt for the sum of 135*l.* in the name of his sister, *Catherine O'Brien*, who afterwards became the plaintiff, *Michael Callaghan*. Upon that occasion, *Daniel O'Brien* informed the manager of the Bank, that his father intended the 135*l.* to be the portion of his daughter, *Catherine*, but desired to retain a control over it during his life ; and that he wished that the deposit receipt should be drawn in her name. The manager at first objected to give the receipt in that form, because *Catherine O'Brien* was not in attendance, and it was the practice of the Bank that depositors should sign their names in a book kept for that purpose ; but upon *Daniel O'Brien* promising that his daughter would attend to sign her name, the receipt was given accordingly. In a few days afterwards *John O'Brien* died ; his administration, with his will annexed, was granted to *Daniel O'Brien*. In August, 1843, *Catherine O'Brien* married *Michael Callaghan* ; and on the 30th of October following, she and her husband demanded payment of the 135*l.* from the Bank. According to the practice in such cases, the manager required the deposit receipt to be produced ; and as *Callaghan* and his wife had it not, he declined giving them the money. On the 4th of November, 1843, *Daniel O'Brien*, by his attorney, served a notice upon the manager of the Bank, requiring him not to pay over the money to the *Callaghans*, and demanding payment of the 135*l.* alleging that he was entitled to it as the administrator of his father, and stating that, in case of a refusal, an

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action would be brought by him for its recovery. *The* Manager refused to pay him, and gave notice to *the Callaghans* of the claim set up by *Daniel*. Both parties then commenced actions at law against the Bank for recovery of the money ; in consequence of which the present bill of interpleader was filed by the public officer of the Bank against *Daniel O'Brien*, *Michael Callaghan*, and *Catherine*, his wife.

It was alleged by the bill, and evidence was given, that it was the custom of all banks, and one necessary for their protection, not to pay any sum of money lodged with them upon a deposit receipt, unless that receipt were produced by the person named in it, or, in some cases, by his agent, or unless the loss of the receipt were satisfactorily accounted for ; in which case the money was generally paid upon an indemnity : and that no partial payments were ever made upon a deposit receipt ; but if the depositor desired to draw part of the money, the old receipt was cancelled, and a new one was given for the balance. It was further in evidence that *Callaghan* and his wife never produced the receipt to the manager of the Bank ; and that *Daniel O'Brien*, at the time of the lodgment, and frequently afterwards, had stated, that *John O'Brien* had declared that he intended the money as a provision for his daughter ; and had accordingly directed it to be lodged, and the receipt for it to be taken, in her name.

Michael Callaghan and his wife, by their answer, insisted that *John O'Brien* had made a gift of the 135*l.* to his daughter ; and that the Bank, having given her a deposit receipt for that sum, became debtors to her for its amount, and could not set up the right of a third person to the money : and that the Bank would have been safe in paying them its

amount, upon their own receipt, and without requiring the production of the deposit receipt; which, to their knowledge, was improperly withheld from the defendants by *Daniel O'Brien*: and they insisted that the plaintiff had not, by his bill, made out a case of interpleader.

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Daniel O'Brien, by his answer, said that he made the lodgment, and took the deposit receipt, in the name of his sister, *Catherine*, without the direction of *John O'Brien*; that *John O'Brien* had desired him to make the deposit in his, *Daniel's*, own name, as he intended the money to be a provision for his daughter, *Catherine*, and for her mother; that he did not make the lodgment in his own name, as he had no beneficial interest in the money; and that he made it in *Catherine's* name alone, as she was the youngest of the persons entitled to it: and he claimed one moiety of the money as the administrator of his father, but for the use of his mother; and said that he withheld the receipt, as he was justified in doing, in order to compel payment of the moiety to his mother: and he denied that the plaintiff had made out a case of interpleader by his bill.

No evidence was given, on behalf of *Daniel O'Brien*, in support of his answer. It was proved that the widow of *John O'Brien* was otherwise provided for.

Mr. *J. J. Murphy*, Mr. *Deasy*, and Mr. *Cogan*, for the plaintiff. Argument.

This is a case of interpleader. (1), The plaintiffs are mere stake-holders; they have no interest. (2), There is a double claim made to the same thing. (3), That double claim arises out of the acts of *John O'Brien*, under whom

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both the defendants claim. *Gaskell v. Gaskell*(that, notwithstanding the change in the form of the receipt, the gift to *Catherine* was not complete, and money constituted part of the assets of *John O* the time of his decease. Now, where merely the a title is given to a third person, the debtor may a bill of interpleader: *The East India Compan wards(b)*, *Wright v. Ward(c)*. The defendant bably, rely on *Crawshay v. Thornton(d)*, and here the Bank have given to *Callaghan* and his wi of action against them, and therefore, that this is of interpleader: but that is a mistake; for as the priation of the money to *Catherine O'Brien* was municated to her, and was not assented to by t except upon a condition which was not compl there never was a valid appropriation: and *O'Brien* could not have maintained an action ag Bank for its recovery: *Williams v. Everett(e)*; *v. Walker(f)*; *Brind v. Hampshire(g)*; *Scott v. P* Another objection to such an action is, that the C have not the deposit receipt; and no person can re money from the Bank without producing the re is not, however, material to consider whether bo have a right of action against the Bank; for the insisting that he has a legal, and the other that equitable right to the money, it is a case of interpleader.

Mr. Baldwin and Mr. B. Lloyd for *Daniel O*

It has not been shown by the plaintiff that the

(a) 2 Y. & J. 502.

(b) 18 Ves. 576.

(c) 4 Russ. 215.

(d) 2 M. & C. 2.

(e) 14 East, 582.

(f) 4 B. & C. 163.

(g) 1 M. & W. 365.

(h) 3 Mer. 652.

case of the Bank being subject to a single liability to one or other of two persons ; it is rather the case of a second liability superinduced by the Bank upon themselves. This, therefore, is not a case of interpleader : *Crawshay v. Thornton(a)*. *Daniel O'Brien* now admits that his action at law could not be maintained, for that there was a complete gift of the 135*l.* to *Catherine* by *John O'Brien*. The Bank could not make any defence to her action, for she might have given secondary evidence of the receipt. But, according to their own case, the Bank had a complete defence to the action by *Daniel O'Brien*, for they were not liable to pay any one but the person named in the deposit receipt. The plaintiff, therefore, was not justified in filing this bill.

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Mr. Martley and Mr. D. R. Kane for Callaghan and wife.

Daniel O'Brien, who now admits the right of *Callaghan* and wife, has by his conduct occasioned this suit. The Bank, by giving the deposit receipt in the name of *Catherine O'Brien*, has acknowledged her title to the money, and cannot now deny it. The object in giving a new deposit receipt upon each dealing with the money, and cancelling the old one, is that the Bank may know who is the person with whom they are to account for the money, so that they may be enabled to obtain a valid discharge therefrom ; and that object would be defeated, if the Bank were to look *dehors* the receipt, for the person entitled to the money : *Bank of England v. Moffat(b)* ; *Bank of England v. Parsons(c)*.

(a) 2 M. & C. 1.

(c) 5 Ves. 665.

(b) 3 B. C. C. 259.

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Gaskell v. Gaskell(a) does not apply; for it is evident that *Catherine O'Brien* must have been informed of and assented to the gift to her. The bill, therefore, must be dismissed, as the plaintiff has not made out a case of interpleader: *Foley v. Hill* (b); *Glynn v. Lock*(c); *Crawford v. Fisher*(d).

Mr. Deasy in reply.

As the right of *Callaghan* and wife is now admitted, the only question is as to the costs of the suit. This is the proper subject for a bill of interpleader. Such a bill lies not merely where there are conflicting *rights*, but also where there are conflicting *claims*. The claim of *Daniel O'Brien* was probable in its nature; it was a question of considerable nicety whether the gift to *Catherine O'Brien* was complete, and one which the Bank were not bound to decide for themselves. In *Crawshay v. Thornton*(e) the plaintiffs had estopped themselves denying the right of one of the defendants; here both parties claim under the acts of *John O'Brien*. But, even if the bill be dismissed, *Daniel O'Brien* ought to be made to pay the costs. Such orders were made in *Mason v. Hamilton*(f), and *Glynn v. Lock*(g).

THE LORD CHANCELLOR:—*Mason v. Hamilton* was a case of interpleader, and the bill was not dismissed; but the defendant, who by his conduct had occasioned the suit, was ordered to pay all the costs. In *Glyn v. Locke*, the bill was dismissed without costs, as against the party who occasioned the suit.

(a) 2 Y. & J. 502.

(b) Phil. 399.

(c) 3 D. & War. 11.

(d) 1 Ha. 430.

(e) 2 M. & Cr. 1.

(f) 5 Sim. 19.

(g) 3 D. & War. 11.

LORD CHANCELLOR :—

The case, as stated by the bill, is, that *Daniel*, before the of January, 1843, deposited 130*l.* with the Bank, in *'s* name. On that day *Daniel* lodged the receipt in bank, together with 5*l.*, and required another receipt in name of his sister, *Catherine*, stating that he did so in his father's direction. It appears that the Bank had to deal, as to the deposit, with *Daniel*, in the absence of *John*, upon his endorsement. The old receipt was cancelled, and a new one given without reference to any previous transaction, acknowledging the receipt from *Catherine* of 135*l.*, to be accounted for. The custom of the Bank is, upon every payment by or to the Bank, to cancel the old and give a new receipt. *John* having died, *Daniel* refused to hand over the receipt to *Catherine* and her husband—she having married,—and he obtained administration of his father and denied their right. The Bank refused to give a receipt to *Catherine* and her husband, unless they produced the old receipt. *Daniel* made a claim against the Bank; and both *Catherine* and her husband, and *Daniel*, commenced actions against the Bank. This is the case stated by the bill, which states that *Daniel*, at the time of the deposit and of the receipt for the 135*l.*, and frequently stated that *John* intended the sum as a provision for *Catherine*, and had accordingly directed the sum to be deposited, and the receipt for the same to be taken, in her name.

The bill does not state any ground of claim on the part of *Daniel*.

Now upon this bill, so framed, I think that a demurrer would have been sustained. In the first place, the transaction created a debt from the Bank to *Catherine*.

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therine. It is the object of this mode of dealing by the Bank, upon every payment or receipt to create a new liability, standing by itself, wholly unconnected with any previous dealing. *Daniel*, with the note endorsed by *John* was allowed by the Bank to deal with the original deposit as representing the owner. If *Daniel* had required payment of the 130*l.*, it would have been paid to him; and he had then paid in the 135*l.* to *Catherine's* account, and received an accountable receipt in her name, it would have been difficult to contend that the Bank could have noticed any claim by *John* against *Catherine's* title, such as *Daniel* afterwards set up. The transaction, as it occurred, is in substance the same. As to the 5*l.*, that was a new deposit; and I cannot separate the 130*l.* from it. The Bank desire me to destroy the efficacy of their mode of dealing. For if the cancellation of the old receipt and the issuing of the new receipt to *Catherine* did not create a new liability, their plan is defective. But it appears to me that, after cancelling the old receipt, and accepting the 5*l.*, and giving a new receipt for the 135*l.* in *Catherine's* name, the Bank became her debtors in that sum, and were not at liberty to resist her demand, or to treat the case as one of interpleader, because *John's* administrator, the very person who made the new deposit and took the new receipt, chose to claim the fund, or, in other words, to rescind the whole transaction. It would not be inconsistent with this view that *John's* representative might still be able to recover against the Bank; but it is their own fault, if they created a new liability in themselves without obtaining a sufficient discharge from the original title. This is not the case of a double demand for one duty; but it is a case in which there may be two liabilities. It does not appear to me that this can be considered as a case of an imperfect gift;

therefore, I express no opinion upon the decision in *Gaskell v. Gaskell*. The Bank appears to consider that they have an equity, because *Catherine* could not deliver up the receipt; but if they are right she could not maintain her action. I should render deposit receipts of little value if I were to sustain this bill; and the Bank would find it necessary to adopt some other plan.

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Independently of the liability of the Bank to *Catherine* upon the new receipt, it might be considered doubtful whether the bill states a good case of interpleader. For *Daniel* appears to be an agent duly authorized to do the act, and his authority was recognised by the Bank; and the mere circumstance of his improperly withholding the receipt from *Catherine* could hardly be considered as raising a conflicting claim: for although, as it is laid down in *The East India Company v. Edwards*, an act by a party entitled, giving a colour of title to another person, is sufficient to support a bill of interpleader, yet the Court is bound to see that there is a question to be tried; which in this case there does not appear to me to be. There was no new title raised by *John* in favour of another; but his agent improperly withheld a document, which, it is represented, is necessary to enable *Catherine* to recover. In *Bowyer v. Pritchard(a)*, the Court of Exchequer, in a suit which they treated as an interpleader suit, upon the coming in of the answers, dissolved the injunction against a defendant, whose title they deemed prior to the title of the co-defendants. In the present case, *Daniel* by his answer set up a title upon the ground that he acted contrary to his father's directions; and the other defendants

(a) 11 Price, 103.

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did not, as they ought to have done, demur to
The Master of the Rolls acted upon the facts as t
appeared before him(*a*) ; but he expressly said th
not called on to decide, nor did he mean to say,
right of the plaintiff to file the bill was establi
thought there was a question for the hearing. I
satisfaction, therefore, of knowing that I am not g
trary to the opinion of that learned Judge.

The case before me, at the hearing, took an
dinary turn, for *Daniel's* counsel insisted that
had any title, disclaimed all right, and required t
be dismissed, as not being properly a bill of inte
Catherine's right, as upon a perfect gift, was clear
at the hearing ; but this of course does not affect
tion, whether, as the case originally stood, the bill
maintained.

I have looked into most of the authorities, s
which are not very satisfactorily decided ; but the er
been, for the most part, already pointed out : the p
upon which this case depends are well settled ; an
very attentive consideration of the case, I am of opi
this bill cannot be maintained as a bill of interple
it must, therefore, be dismissed, with costs, against C
and her husband, and the injunction be dissol
must also be dismissed against *Daniel* ; but with
as his conduct has occasioned the suit.

(*a*) The plaintiff moved on the junction until the hear
answers, at the Rolls, for an in- was granted. 6 Ir. E

1845.

In re MOLONY, Petitioner.

(1 Will. 4. c. 60).

May 26.

THE facts of this case appear sufficiently from the judgment of

By marriage settlement a judgment was vested in trustees; and it was declared that if the wife should, with the consent of her husband, think it advisable to call in the sum secured thereby, the trustees were to permit her to use her discretion as to the re-investment of same. One trustee died; the other was out of the jurisdiction. The wife, with the consent of her husband, called in the money; and she and her husband assigned the judgment to a third person, who advanced the money; but the surviving trustee refused to execute the assignment, and desired to be discharged from the trusts. The

THE LORD CHANCELLOR :—

In this case a petition was presented for the appointment of a new trustee under the 1st Will. IV. c. 60, s. 22. By a settlement of 1833, trusts were declared of two judgments which had been assigned to two trustees, who both executed the settlement; but one of whom is dead, and the other is resident in London, where both the husband and wife resided at the time of the marriage. The surviving trustee is now desirous of being discharged from the trust. The settlement is a singular and a defective one. It contains a declaration that if the wife should, with the consent of her husband, think it advisable to call in the sums secured by the judgments, the trustees were to permit her to use her discretion as to the application of the same, either in investing in the public funds, lending on mortgage, purchasing lands, ground or profit rents, or in any other way appearing to her eligible or desirable. But still the new securities would be subject to the trusts of the settlement.

The petition states that the wife, with the consent of her husband, has called in the money for the purpose of re-

court, thinking that the real object of the parties was, not to continue the money in settlement, but, under colour of the power, to get it out of settlement, refused to appoint new trustees.

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investing the same in good and profitable securities according to the trusts of the settlement; and that assignment of the judgments has been executed by husband and wife to a Mr. *Boyle*, who has advanced money; but that the surviving trustee declines to execute assignment. The money has been deposited "in Bank in the joint names of Mr. *Boyle* and the husband, where it remains unproductive." I do not think that this is a case in which I ought, in the exercise of a sound discretion, to make an order under the twenty-second section. It appears to me that the real object of the parties is, not to continue the money in settlement, but, under colour of the power, to get the money out of settlement. It is stated that the husband is upwards of fifty years of age, and that there is no issue. Still I must see what the intention is. No new trustee would be advised to assign the judgments without obtaining the money, and seeing that it was properly invested, although the wife would have the right to point out the nature of the investment. There are few trustees who would choose to involve themselves in such a trust; and this Court would not place the fund in the power of a single trustee. I am asked to direct a reference to the Master to inquire whether the surviving trustee is possessed of the money in Bank as a trustee. But the parties should not have executed the trust as they have done without the concurrence of the old trustee, or the appointment of new ones. A trustee, before he assigned the judgments and accepted the money, would require to know how the wife desired the money to be re-invested. But, as I have already said, the object probably is to place the money wholly within the disposition of the husband and wife, who cannot make any order on the petition.

1845.

HAMILTON v. KIRWAN.

May 26.

JAMES HAMILTON being seised and possessed of several houses and premises in the city of Dublin, held under lease for lives renewable for ever, and for terms of years, let to rent, by indenture of the 21st of November, 1845, in consideration of love and affection, conveyed the same to his son, *George Hamilton*, his heirs, executors, and assigns, upon trust, in the first place, out of the rents and profits to pay the head rents and taxes, and other outgoings of; and then to pay an annuity of 52*l.* sterling to *James Hamilton*, the younger, the son of the grantor, during his life; and after his decease, in case he should leave no lawful issue him surviving, to pay said annuity to his issue, as therein directed; and after payment of the head rents and annuity and other outgoings, upon trust to divide and apply the surplus of the rents and profits to the support and maintenance of *James Hamilton* the elder, and towards the maintenance and education of his grandchildren, the children of his son, the said *George Hamilton*, they should attain their respective ages of twenty-one years, or be married, when the same was to be divided and distributed between and amongst such of the said last-named children as should live, in the manner therein directed. And it was declared that in case *James Hamilton*, the younger, should die without lawful issue, the annuity thereby provided for him should be added to the fund provided for the children of *George Hamilton*, and should live to attain the age of twenty-one years or be married: the entire of such fund as should be so created, to

Strong suspicion that an appointment by a father to his son was for the benefit of the father, and a fraud upon the power of appointment, is not sufficient to avoid the transaction.

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be distributed and divided between and amongst the such shares and proportions as *George Hamilton* sh by deed or will appoint ; and in default of such app ment, then upon trust for the issue of *George Han* in equal shares and proportions.

James Hamilton, the elder, died in 1842. The dren of *George Hamilton* were the Rev. *James Ham* *George John Hamilton*, and the plaintiffs, *Charlotte derick*, and *Mary Anne Hamilton*.

The plaintiffs by their bill stated, that *George H ton*, in the year 1836, became involved in difficulties indebted to several persons, and, amongst others, to *M Thomas* and *John Fottrell*, in a sum of 234*l.*, which secured by bills of exchange accepted by him ; and l so indebted, he applied to *John Fottrell* to assist h raising a sum of money by mortgage, to meet the pre demands against him. That *John Fottrell* introduce to his son, *George Drevar Fottrell*, a solicitor, who posed to procure an advance of money for *George H ton* on a mortgage of the said lands and premises.

George Hamilton had been theretofore in the hat consulting *Joseph Maxwell* as his solicitor, and went t and told him of such proposal, when *Maxwell* info him that he had no title to the premises, the same l vested in him solely as trustee ; whereupon *George milton* returned to *George D. Fottrell*, and having him the deeds relating to the premises, *Fottrell* devi plan for depriving the plaintiffs, who were then all age, of their rights and shares of the said property, a enabling *George Hamilton* to raise money on it ; ar cordingly proposed that if *George Hamilton* would e:

an appointment under the deed of 1823, to one of his sons, and then procure such son to execute a mortgage of the property so appointed, purporting to be a mortgage in consideration of money paid to such son, he would procure Mrs. *Bridget Fry*, a relative of his own, to advance the money to *George Hamilton* on such security. That *George John Hamilton*, a son of *George Hamilton*, was then about twenty-seven years of age; and that *Fottrell* proposed that the intended appointment should be made to him, and that he should then execute the intended mortgage: and that *George John Hamilton*, who then was a clerk in his father's business, was induced to join in the plan solely for the purpose of getting the money for his father; he being wholly under his influence, and being assured by *Fottrell* that the intended plan for raising the money was perfectly legal.

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By indenture of the 30th of July, 1836, after reciting the settlement of November, 1823, but not stating that the children of *George Hamilton* had any present beneficial interest thereunder for their maintenance and education, *George Hamilton* appointed to his son, *George John Hamilton*, certain parts of the settled property, which in fact constituted almost the entire of it. And by an indenture of mortgage of the 6th of August, 1836, made between *George Hamilton*, of the first part; *George John Hamilton*, of the second part; *James Hamilton*, the annuitant, of the third part; and *Bridget Fry*, of the fourth part; after reciting the deed of appointment of the 30th of July, 1836; that *George John Hamilton* had applied to *Bridget Fry* for a loan of 800*l.*, to be secured by mortgage on the premises so appointed to him; that *Bridget Fry* had consented to advance said sum on the terms aforesaid; and that *James Hamilton* had agreed to become an executing party

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thereto, in order that *Bridget Fry* should hold the discharged from the payment of his annuity ; it nessed that, in consideration of the sum of five shill to *George Hamilton*, and of 800*l.* paid to *George . milton*, and of five shillings paid to *James Hamilt* the said *George Hamilton*, *George John Hami* *James Hamilton*, according to their several estat terests therein, conveyed the said lands to *Bridge* heirs, executors, &c., subject to redemption upon of the sum of 800*l.* as therein mentioned.

It appeared that both these deeds were pre *George D. Fottrell*, and that they were peruse *Maxwell*. The execution of the deed of appoint attested by Mr. *Fottrell* and Mr. *Maxwell* ; the mortgage was attested by Mr. *Maxwell*. It also that the draft deed of mortgage, which had been p Mr. *Maxwell*, was dated in July, 1836. Contempo with the mortgage, *George Hamilton* and *Geo Hamilton* executed their joint and several bond *Fry*, conditioned for the payment of the sum of 8 interest ; and Mrs. *Fry* wrote a letter to *George* dated the 6th of August, 1836, in these terms : “ knowledge that it was agreed between us, previc and your son, *George John Hamilton*, executing of mortgage to me for 800*l.*, and which is count by you and your son’s bond to me for that amou would not call in the principal money for three y vided the interest shall be regularly paid every or within ten days after each gale shall become (judgment was entered on the bond. The mortg receipt for the 800*l.* endorsed on it, signed l *John Hamilton*, and witnessed by Mr. *Maxwei*

was no direct evidence to whom the money was paid. The bill charged that it was paid to *George Hamilton*, and that he deposited 739*l.*, part of it, in the Hibernian Bank, in his own name; and evidence was given that on the 12th of August, 1836, a sum of 739*l.* was paid (but by whom, it did not appear) into the Hibernian Bank to the credit of *George Hamilton*.

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—
Statement.

In September, 1838, *George Hamilton* became a bankrupt; and upon an application by *George John Hamilton* to prove for the sum of 800*l.* under the commission, his Honor, the Bankrupt Commissioner, expressed an opinion that the transaction of 1836 was a fraud upon the power; and he refused to allow the proof, but directed the assignee to retain the amount of the dividend on the 800*l.* until further order.

James Hamilton died in 1842, without issue; and *Bridget Fry* died in June, 1840, and appointed *James Kirwan* and *Edmond Mooney* her executors, who proved her will, and in November, 1842, filed their bill to foreclose the mortgage; upon which they, in December, 1843, obtained a decree *pro confesso*.

George Hamilton had not executed any other appointment of the trust property.

The bill, which was filed against *James Kirwan* and *Edmond Mooney*, *George Drevar Fottrell*, *George Hamilton*, *George John Hamilton*, and others, prayed that the deed of appointment of the 30th of July, 1836, might be declared null and void as to the plaintiffs; and that *George Hamilton* might be decreed to make an appointment to the plain-

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Statement.

tiffs of three-fifth parts or shares of the premises comp
 in the settlement of November, 1823, or that the
 might make distribution thereof, according to the r
 law and equity, and the rights of the parties; and
 the mortgage of the 6th of August, 1836, might be de
 null and void, so far as it purported to affect the sha
 the plaintiffs; and that the executors of *Bridget Fry*
 be restrained from proceeding to sell so much of th
 mises as the plaintiffs were entitled to; and that *Geo*
Fottrell, and such other of the defendants as were
 thereto, might be decreed to pay all the costs of the

The plaintiffs did not give any evidence in support
 statements in the bill, that the transaction was, in its
 tion, a loan to *George Hamilton*, or as to the plan t
 charged to have been devised by *George D. Fottrell*
 at the hearing they consented that the bill should
 missed as against him. The defendants did not ex
 any witnesses.

Argument.

Mr. Moore, Mr. Martley, and Mr. Haig, for the pla

Mr. J. J. Murphy and Mr. Wall for the defen
Kirwan and *Mooney*.

Mr. J. Plunkett for the Rev. J. Hamilton.

Mr. I. O'Callaghan for *George D. Fottrell*.

M^cQueen v. Farquhar(a), Palmer v. Wheeler(1
 2 Sugd. on Powers, 192, were referred to.

(a) 11 Ves. 467.

(b) 2. B. & Beat. 18.

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Judgment.

THE LORD CHANCELLOR :—

This bill is filed to impeach a mortgage granted to Mrs. Fry, on the ground that it arose out of an improper agreement between a father and his son. Upon the face of the instruments,—the deed of appointment and the mortgage,—there is nothing to convey to the mind that there was any proper dealing between the parties. It is a regular appointment by the father to his son, no doubt, of a considerable portion of the estate ; but no question has been raised on the doctrine of illusory appointments, nor could it be without reference to the provisions made for the other children. The execution of that appointment was witnessed by Mr. *Maxwell*, who, I must consider, was the solicitor of the family. So far the transaction appears to have been regular, and to have been entered into with the approbation of the family solicitor. The execution is also attested by *Strell*, the solicitor for Mrs. *Fry*. The mortgage also is perfectly regular in its form and execution.

It is clear that the son might have effectually mortgaged the estate the day after the appointment, provided he raised the money *bonâ fide* for himself. Then as to the knowledge of the mortgagee in this respect :—the mortgage recites an application by the son himself, for the money ; and the whole of the money is stated to have been paid to him ; and throughout the transaction it appears to be that of a mortgagee dealing with the son ; and there is endorsed on the deed a receipt for 800*l.*, signed by the son, and witnessed by *Maxwell*. Therefore, *Maxwell* could not now be heard to say that this was an improper transaction. It is not asserted that Mrs. *Fry* herself knew of any underhand agreement

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Judgment.

between the father and son ; if she is to be visited it must be by the doctrine of constructive notice ground that *Fottrell* had notice of such an s Before I examine it on that ground, I would ob: *Fottrell* being charged with the fraud and mad dant in the cause, and Mrs. *Fry* being charge consequences of that fraud, but no attempt beir bring the fraud home to her except by the doctri constructive notice, the bill is, by consent of the pla missed against *Fottrell* without costs. So that against whom the fraud is charged, is dismissed other person, against whom it is not charged, is still liable. If fraud had been proved against *Foti* might have been had against him ; and that r have afforded the strongest ground to visit Mrs the consequence of notice of the fraud.

That there is a suspicion of fraud in this case, can deny who understands the nature of the t The drafts of the appointment and mortgage are both prepared by the mortgagee's solicitor. Unl pointment was made for the purpose of the mort is not a probable transaction. But it cannot be a because the appointment was made with the v son raising money by mortgage, therefore the m invalid. The circumstance, in itself, amounts to it would have been important, if the parties had g and connected it with other matters : but when I *well* attesting the execution of the mortgage, little weight might be due to that circumstance done away with. In the draft of the mortgage altered. That is not entitled to any weight, for I any alteration in the date of the deed of appointm

must have been intended to be executed at an earlier date than the mortgage. Then it is objected that the father joined in the deed of mortgage. I think that was regular. The elder brother of the father, who had an annuity under the settlement charged on these lands, joined in the mortgage, and gave priority to it: the father had obtained a renewal of the lease under which the lands were held, and thereby became a trustee of the legal estate for the persons entitled: he was the proper person to take the renewal; it was, consequently, necessary that he should join in transferring the legal estate to the mortgagee. The way to try the matter is this: supposing this were a *bonâ fide* transaction, would the deed have been otherwise prepared? Clearly not. It would have been prepared just as it now stands. I cannot, therefore, attach any weight to these circumstances. It is then urged, that the father joined in the bond and warrant of attorney with the son, and that that circumstance casts great suspicion on the whole transaction. It certainly has more weight with me than any other circumstance in the case; for it is not noticed in the mortgage, which takes notice of the bond of the son, but not of that of the father, or that he was a co-obligor with his son. It looks as if the parties desired to keep out of view the fact of the father having joined in the bond. But it amounts to nothing more than a suspicion, although I think it is suspicious. So the letter addressed by the mortgagee to the father shows that the father was considered as more than a surety; but still that is consistent with this being a *bonâ fide* transaction; for, the son being a young man, nothing is more natural than that his father should take part in the transaction. Nevertheless, both those circumstances do constitute a shade of suspicion.

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Then the case stands thus : the plaintiffs having undertaken to prove that there was a corrupt agreement between the father and son, have failed in doing so. They thought they should make their case stronger by showing that the father was in embarrassed circumstances ; they have alluded to it, but have failed to prove it. They have not, therefore, a ground for imputing fraud ; and they have wholly failed in proving payment of the money to the father. I must conclude that the money reached the hands of the son alone ; what was done afterwards with it I know not ; and I am not at liberty upon mere suspicion, to do so dangerous a thing as to impeach the title of a *bonâ fide* mortgagee without notice. *M^{rs} Queen v. Farquhar*(a) the question did not arise between the immediate parties. Lord *Eldon* there observes : "I should very reluctantly lay down, that notice from opinion in an abstract, or anything that appears upon a deed, there may by possibility be reason to suspect what I cannot know, and may not be true, that the title is bad, is sufficient notice as would affect a purchaser." He was there speaking of a transaction of a different nature ; here the mortgage was an actor ; but the same doctrine, to a certain extent must apply to this case. I may hold an actor more strongly to proof of the *bonâ fides* ; but there is no ground shown why *Mrs. Fry*, with her money in her hand, should advance it except upon a good title. She was not a connexion of the family, and had no advantage beyond that of a common mortgagee. I must, therefore, dismiss the bill as against her ; and the only question is, as to the costs.

If I were quite satisfied that there was no foundation for the bill, I should dismiss it with costs : but I am bound

(a) 11 Ves. 467, 482.

say, that there is so much of suspicion in the case as fairly justified the family in investigating the matter. It is better for persons with money not to mix themselves up with family transactions of this nature. I dismiss the bill without costs.

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JAMES WISE being, in the year 1807, entitled to the lands of Bohernagore and Curragoosa, held under a lease for lives renewable for ever, made his will, whereby, as was alleged by the bill, he devised all his estate and interest therein to his eldest son, *Thomas James Wise*, subject to a perpetual annuity or yearly rent-charge of 600*l.* of the late currency, to the testator's second son, *John Wise*; provided, that in case *Samuel Godsell* and *James Godsell* should establish a claim or demand which they had upon the lands, then *John Wise* should have a rent-charge of 400*l.*

Upon the admission of the heir at law, that the will of the testator, which was lost, was duly executed and attested, and that thereby certain lands were devised to him, subject to a perpetual rent-charge; and upon evidence of the contents of the will, by two witnesses, who heard it read, but could not

state that it was executed and attested as by law required, further than that the person reading it read out the names of the testator and of certain persons as if they had executed and attested it; and upon proof of the payment of the rent-charge for thirty-five years up to the year before the filing of the bill, the Court declared that the lands were well charged with the annuity; and that the heir at law, and the persons deriving with notice under a settlement of the lands executed by him, on the marriage of his son, and duly registered, and also the judgment creditors of the heir at law, were bound to give effect to the devise of the rent-charge.

By marriage settlement, a rent-charge was granted to trustees and their heirs, upon trusts for the husband and the issue of the marriage; and the lands were granted to other trustees for a term of years, upon trust to secure the rent-charge. One of the trustees of the rent-charge admitted that, before the execution of the settlement, he had notice of a prior incumbrance on the lands; and one of the trustees of the term, denied that he had such notice. No evidence of notice was given:—*Held*, that notice to the trustee of the rent-charge was sufficient: but, there being no issue of the marriage *in esse*, the Court would not declare that their interests were bound by the prior incumbrance, but declared that the trustee had notice of it.

Costs given against a party, who by his want of caution in settling an estate without giving notice that it was subject to a prior demand, rendered a suit by the prior incumbrancer necessary to establish his rights.

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 testator, in lieu of the rent-charge of 600*l*.
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James Wise died in March, 1807, leaving *Thomas James Wise* and *John Wise*, his only sons, him surviving.

Upon the death of his father, *Thomas James Wise* entered into possession of the lands. The will was not proved; the bill suggested that it was not proved, because the decesses feared lest the knowledge of its contents might provoke the *Godsells* to assert any latent claim they might have to the lands; but *Thomas James Wise* regularly paid the rent-charge of 600*l*., from the death of the testator to the death of *John Wise*, which occurred in 1819, and thence until the year 1842, as hereafter mentioned.

In 1812 the *Godsells* filed their bill in the Court of Chancery, against *Thomas James Wise*, for the purpose of establishing their claim against the lands; and *Thomas James Wise*, in his answer to that bill, admitted that he claimed to be entitled to the lands under and by virtue of the will of *James Wise*: but before any further proceedings were had in that cause, the claim of the *Godsells* was compromised by the payment to them of the sum of 1250*l*., by *Thomas James Wise* and *John Wise*, in equal shares.

John Wise, by his will dated the 22nd of October 1819, after reciting that, by the will of his father, he was entitled to a rent-charge of 600*l*. per annum, charged upon the lands of Bohernagore and Curragoosa, devised the same to his son, *James Laurence Wise*, his heirs, executors &c., and directed his executors thereout to appropriate certain annual sums therein mentioned, to the maintenance

and education of his said son, then a minor ; and appointed *Thomas James Wise* and *G. Brereton* his executors.

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John Wise died, and his will was proved by his executors. *G. Brereton* died shortly afterwards, and *Thomas James Wise* applied the annual proceeds of the rent-charge according to the trusts of the will of *John Wise*.

James Laurence Wise attained his age of twenty-one years in September, 1837 ; and from thence up to the 1st of November, 1842, *Thomas James Wise* paid him the rent-charge of 600*l.* per annum.

By indenture of the 21st of June, 1841, being the settlement executed in contemplation of the marriage of the Rev. *Henry Wise*, second son of *Thomas James Wise*, with Miss *Anne Gillman* ; after reciting that *Thomas James Wise* was then seised of the lands of Bohernagore and Curragoosa, by virtue of a renewed indenture of lease, dated the 11th of August, 1828, for the term of three lives therein named ; he, *Thomas James Wise*, granted an annuity or rent-charge of 250*l.* per annum, charged upon and payable out of said lands, to *James Wise* and *Thomas Gillman* and their heirs, for the lives named in the then existing lease of the lands and to be named in every future renewal thereof, upon trust for the Rev. *Henry Wise*, for his life ; and after his decease, for the benefit of the issue, if any, of the then intended marriage ; and in default of such issue, upon trust for *Thomas James Wise*, his heirs and assigns ; subject to a proviso therein contained for enabling *Henry Wise* to jointure any after-taken wife. And *Thomas James Wise* granted and demised the said lands unto *Edward Wise* and *William Crooke*, for the term of 500 years, upon trusts therein declared for

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the purpose of further and better securing the payment the annuity of 250*l.* And *Thomas James Wise* covenant with *Thomas Wise* and *Thomas Gillman*, that he would, all times, save harmless and keep indemnified the annuity 250*l.*, and the lands charged therewith, from every charge or incumbrance whatever. There was no issue of this marriage.

The bill was filed by *James Laurence Wise* against *Thomas James Wise*, the Rev. *Henry Wise*, *James Wise*, *Thomas Gillman*, *Edward Wise*, *William Crooke*, and judgment creditors of *Thomas James Wise*. It charged that, immediately after the interment of *James Wise*, his will was opened and read in the presence of the testator, and of several other persons; that it was then taken and accepted by all the persons present, as and for the last will and testament of *James Wise*, and as being duly executed and attested. It further charged that the will had been lost, and that no copy of it was to be found; that the several parties to the settlement of the 21st of June, 1841, or having charges or incumbrances affecting the lands, created by *Thomas James Wise*, had notice of the will and of the devise of the rent-charge of 600*l.* per annum thereby made, at the respective times of the execution of the settlement, and of advancing the money secured to them by the judgments: and prayed that the said will of *James Wise*, as far as same regarded the devise of the perpetual rent-charge of 600*l.* per annum, late currency, to *John Wise*, might be established as against *Thomas James Wise*, the heir at law of *James Wise*; and that said rent-charge might be declared to be well charged upon the lands of *John Wise* at *hennagore* and *Curragoosa*, in perpetuity, in priority to several charges and incumbrances created by *Thomas James Wise*, affecting same lands; and for an account of the

was due to the plaintiff on foot of same ; and for payment thereof.

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Thomas James Wise, by his answer, admitted the will of *James Wise* as stated in the bill ; and that, immediately after the interment of *James Wise*, it was read in the presence of several persons, and was then taken and accepted by the persons present, as the last will of *James Wise* ; and that it was duly executed and attested.

William Crooke said he never executed the settlement of 1841, or heard that he had been made a party to it, until he heard that he had been made a defendant in the suit ; and he disclaimed all interest in the lands.

James Wise and *Edward Wise* said, that they heard and believed that *James Wise* duly made his will, of the import and effect in bill stated : but *Edward Wise* said that it was only since the execution of the settlement of 1841 he so heard, for that he was previously under the impression that *James Wise* had died intestate. They admitted that the will was duly attested ; and submitted that, as the settlement of 1841 had been duly registered, the issue of the marriage were entitled, in respect of the estates and interests limited to them, to priority over the rent-charge of 600*l.* per annum. And *James Wise* said, that before the execution of the settlement of 1841 he had heard and believed, and *Edward Wise* said, that since the execution thereof, he had heard and believed that the said lands were charged with the rent-charge of 600*l.* per annum by the will of *James Wise*.

Belinda Hornibrooke, a judgment creditor of *Thomas James Wise*, said that she knew nothing of the will of

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James Wise, or of the devise of the rent-charge to *John Wise*; and that she neither admitted nor disputed, nor knew anything whatever about the validity or priority of the rent-charge of 600*l.*, or of the plaintiff's title thereto; and referred to such proof as he should make in respect thereof: and denied notice.

The cause was heard upon pleadings and proofs as against the defendants, *Thomas James Wise*, *James Wise*, *Edward Wise*, *William Crooke*, and *Belinda Hornibrooke*; and upon an order to take the bill as confessed against the other defendants.

Henry Blakeney Wise and *Thomas Wise*, who alone, of the persons present at the reading of the will of *James Wise* (except the defendant, *Thomas James Wise*), were still living, were examined.

Henry B. Wise deposed that, after the funeral, he went to the house of *James Wise*, to hear his will read; that upon that occasion a will of *James Wise* was produced by one of his sons, and was opened and read, but he could not say by whom, in the presence of the sons of the testator and the other persons assembled; that it was the last will of *James Wise* which was opened and read; that he saw the will, but could not say that he took notice of its being signed and executed; that the person who read out the will read it as if it was duly signed, executed, and attested; that he could not say by whom it was attested, but he took it for granted and verily believed it was duly signed by the deceased, and attested in due form; that he could not give any description of the will, that is, he could not take it upon himself to say whether it was written on paper or parchment, nor the names

of the witnesses thereto, nor in whose handwriting it was, nor if it was signed by *James Wise*, further than that the person who read the will read out the name of *James Wise*, as if signed thereto, as well as certain names purporting to be witnesses thereto: that the will was received by all persons present as the last will and testament of *James Wise*. He then stated the purport of the will, which was as in the bill mentioned: and in answer to another interrogatory said, that the person who read out the will read it as if it was duly signed by the testator, and duly witnessed by three or more persons.

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The deposition of *Thomas Wise* was to the same effect.

A search for the will was proved.

Mr. Serjeant *Warren* and Mr. *Jenkins*, for the plaintiff, cited *Ellis v. Medlicott*(a); *Doe d. Ashe v. Calvert*(b); *Villiers v. Villiers*(c); *Whitfield v. Faussett*(d).

Argument.

Mr. *Moore* and Mr. *Herrick* for *Thomas James Wise*.

Mr. *J. S. Townsend* for *Belinda Hornibrooke*.

Mr. *Leslie*, for *James Wise*, one of the grantees of the rent-charge of 250*l.* per annum, and for *Edward Wise* and *William Crooke*, the trustees of the term of 500 years, to secure that rent-charge.

No evidence of notice to the trustees before the execution of the settlement of 1841 has been given. *James Wise*, by

(a) 4 Beav. 144.

(b) 2 Camp. 387.

(c) 2 Atk. 71.

(d) 1 Ves. 387.

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his answer, admits that he knew of the will before the execution of the settlement; but that admission cannot be against the issue of the marriage, if such should cease. *Edward Wise* denies that he had any notice of the will before the execution of the settlement. The claimants under the settlement of 1841 are, therefore, entitled to the annuity of 250*l.* in priority to the plaintiff's debt. *Eyre v. Dolphin(a)*.

Mr. Serjeant *Warren* in reply.

There was sufficient notice to the trustees. The settlement of 1841 recites that *Thomas James Wise* was entitled to the lands under a renewal of the original lease; if, therefore, the trustees had traced back the title, they would have found that *Thomas James Wise* derived his title under the will of *James Wise*. One of the trustees admits he had notice; which is sufficient.

Judgment

THE LORD CHANCELLOR :—

I think there is secondary evidence of the existence of the will of *James Wise*. It is true that it has not been proved that it was executed by the testator, or attested. If the will had been produced we should have seen what was on the face of it, it purported to be executed and attested, and there would have been no further evidence required to prove those facts. There is clear proof that the will existed, that it has been lost, and of its contents. The question is, whether I am to consider it as not sufficient.

(a) 2 B. & Beat. 290.

proved, because the witnesses do not say that they observed that it was attested by three witnesses. The heir at law was present, and heard the will read; and it was read as binding the real estate with the payment of this perpetual rent-charge. He is still alive; and he has for thirty-five years performed the obligation imposed on him by the will, paying the rent-charge of 600*l.* per annum, which he was not bound to do except by the will. If there were parties before me who were really disputing the existence of the will, I might give them an issue: but none of the parties before me can dispute it. *Thomas James Wise*, the heir at law, is not at liberty to do so. *Henry Wise*, his son, cannot dispute it; neither can the judgment creditors or the trustees. I am of opinion that, for the purposes of this suit, there is secondary evidence of the existence, loss, and contents of the will; and that I am bound to establish it.

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Then the question arises, how am I to bind the parties? All the judgment creditors, save one, have allowed the bill to be taken *pro confesso* against them. On behalf of the creditor who appears, the objections made are principally those arising from defect of proof of original title, which I have already dealt with. Can, then, the judgment creditor object to the annuity being a charge on the lands in priority to her demand? I think not; for if the will were now produced I should hold that the party against whom the judgment has been recovered, taking the estate subject to the legal rent-charge, had no interest in the lands which could be bound by the judgment, except the inheritance subject to the rent-charge; and his judgment creditor can have no greater interest. I therefore must declare that the

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plaintiff is entitled to the relief prayed as against all judgment creditors. The same declaration will be made against *Thomas James Wise*, and *Henry Wise*, the tenants for life of the annuity of 250*l.* The only question is, as the unborn children of *Henry Wise*, who are here represented by some of the trustees. There were two trustees of the annuity of 250*l.* One of them, *James Wise*, admits that he had notice of the plaintiff's title before the execution of *Henry Wise's* settlement. I apprehend that that admission of notice will bind not only the persons claiming under him, but also his *cestuis que trust*. This is a case in which the grantor of that annuity had notice; and *Henry Wise*, I must assume, had notice, though not so as to bind the other parties; and if in addition, one of the trustees had notice, it would be very difficult for the children of *Henry Wise* to get rid of it. There were also two trustees of the term for years to secure the annuity of 250*l.*, one of whom did not execute the settlement. That, however, is not important; for where an estate is vested in trustees who do not object at the time, they will not be allowed at a future time to say that they never assented to the conveyance. It would require some strong act to induce the Court to hold that, in such a case, the estate was divested. I speak with respect to the effect which such an admission might have upon third parties. Where an estate is regularly conveyed to trustees, every Court and every jury will presume an assent. Here one of the trustees of the term disclaims; the other says he had no notice of the plaintiff's title; and the question is, what is the effect of that. The want of notice to the trustees of the term is of no consequence, if the trustees of the annuity had notice.

But this suit, I apprehend, will not bind the issue of the marriage, if any should come *in esse*. I am not, therefore, disposed to make any declaration purporting to bind the issue: that would be doing more than I am called on to do. I shall declare, according to the precedents, that *Thomas James Wise, Henry Wise*, and the judgment creditors, are bound, according to their several interests in the lands, to give effect to the will of *James Wise*; without prejudice to any question which may arise, after the death of *Henry Wise*, between his issue and the plaintiff: and declare that *James Wise*, the trustee, had notice of the plaintiff's title; and that *Henry Wise* is not at liberty to exercise the power of jointuring given to him by his settlement.

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Then as to the costs. If this were the simple case of the loss of the will, I would not give costs, except to the trustees; but *Thomas James Wise*, who has paid this annuity for thirty-five years, and knew that the will had been lost, and that consequently there would be a difficulty in establishing the title to the annuity, in 1841 made a settlement and created the only difficulty in the case. In that settlement he did not disclose, as he ought to have done, the circumstance that he was entitled to the lands subject to this perpetual rent-charge of 600*l.* a year. It was at least half the value of the estate; and cannot be represented as a mere trifling circumstance which it was unnecessary to notice. He was not at liberty to deal with the estate without apprizing the persons with whom he was dealing, of the existence of this annuity. And though there is nothing special in the covenant of *Thomas James Wise* against incumbrances, yet it appears to me that that covenant has, in a great measure, led to this suit. I therefore think that he must pay all the costs of this suit.

1845. Without acting dishonestly, he has acted with such want of caution, that he has placed an encumbrance on the estate, which has led to this suit. The plaintiff is to pay the costs of the other defendants, except *Thomas James Wise*, and to have those costs over, together with his own, against *Thomas James Wise*.

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Decree. *Extract from the Decree.*—It appearing to the Court that the original will of *James Wise*, the plaintiff's grandfather, is lost, declare that there is sufficient secondary evidence in this cause as to the existence, due execution, and attestation of the said will, so as to pass freehold estates by devise, and as to the contents of said will, so far as the same regards the devise thereby made of the lands of Bohernagore and Curragoosa, in the pleadings mentioned, to the defendant, *Thomas James Wise*, his heirs and assigns subject to a perpetual rent-charge or yearly sum of 600*l.* late Irish currency, equivalent to the sum of 553*l.* 16*s.* 11*d.* sterling, to *John Wise*, the plaintiff's father, in the pleadings named. And his Lordship doth accordingly declare and direct, that the said will, so far as the same regards said devise to the said defendant, *Thomas James Wise*, subject to the said perpetual rent-charge or yearly sum of 553*l.* 16*s.* 11*d.* sterling, should be and the same is hereby established against the defendant, *Thomas James Wise* the heir at law of the said testator, *James Wise*; against *Henry Wise*, the tenant for life of the said rent-charge of 250*l.* sterling, created by the indenture of settlement of the 21st of June, 1841, in the pleadings mentioned; and against *Catherine Shenkwin*, *Henry Blakeney Wise*, *Arum Hill* and *Thomasina* his wife, *Belinda Hornibrook* and *Thomas Wise*, the judgment creditors of the said

endant, *Thomas James Wise*; without prejudice to the right of the children (if any) of the said *Henry Wise* and *Mary Anne* his now wife, to take any proceedings they may be advised, in relation to their priority, in respect to said rent-charge of 250*l.*, or the said rent-charge of 553*l.* 16*s.* 11*d.* now vested in the plaintiff. And declare said rent-charge of 553*l.* 16*s.* 11*d.* to be well charged in perpetuity on said lands of Bohernagore and Curragoosa, comprised in said indenture of lease bearing date the 13th of January, 1698, and the renewal thereof bearing date the 11th of August, 1828, as of the 1st day of March, 1807, being the day of the death of said *James Wise*, in priority to the several charges and incumbrances in the pleadings mentioned, created by the said *Thomas James Wise*, affecting the same lands since the decease of the said testator, *James Wise*; without prejudice, nevertheless, to the right of the children (if any) of the said *Henry Wise* and *Mary Anne* his wife, to take any such proceedings they may be advised, as aforesaid. But declare that the defendants, *Thomas James Wise*, *Rev. Henry Wise*, *James Wise*, and *Thomas Gillman*, at the time of the execution by them of the said indenture of settlement of the 21st of June, 1841, had notice of the said perpetual rent-charge of 553*l.* 16*s.* 11*d.* having been devised to the said *John Wise* by the said will of the said *James Wise*, and of the plaintiff's right thereto: and declare that the *Rev. Henry Wise*, in the event of his surviving his present wife, *Mary Anne*, shall not be at liberty to exercise the power by the said indenture of settlement of the 21st of June, 1841, given to him, of jointuring any after-taken wife, to the prejudice of said rent-charge of 553*l.* 16*s.* 11*d.*, vested in the plaintiff as aforesaid. Let the plaintiff pay the several defendants, *James Wise*, *Edward Wise*, *William Crooke*, and *Belinda Hornibrooke*,

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their costs in the cause ; and let the defendant, *James Wise*, pay same over, together with plaintiff costs of suit, to the plaintiff.

NIXON v. NIXON.

May 28.

A money fund was vested in trustees upon trust to permit the intended wife, during the joint lives of herself and her intended husband, to take the interest thereof for her separate use ; and after the decease of the husband, in trust for the wife and her assigns during her life, in case she should survive him ; and after the decease of the wife, as to one moiety of the property, upon trust for the sole and absolute use of the wife, to be disposed of by her in such manner as she might by deed or will, notwithstanding her coverture, appoint ; and, in default of any such appointment, upon trust as therein mentioned.

The wife cannot, during the coverture, make an absolute disposition of the money trust fund.

UPON the marriage of *Frederick Nixon* with *Cunningham*, widow, a settlement, dated the 6th 1842, was executed, whereby *Harriet Cunningham* *Frederick Nixon* jointly and separately covenanted with *William Hitchcock* and *George Cooke*, the trustee named, that if at any time after the solemnization of marriage and during the life of *Harriet Cunningham* monies or other personal estate or property should to or devolve in any way upon her or *Frederick Nixon*, then and so often as the same should be received by *Frederick Nixon* and *Harriet Cunningham*, and their respective executors and administrators, should execute and do all proper deeds and acts for effectually vesting monies or other personal estate or property in the said *Harriet Cunningham* upon trust to permit and suffer *Harriet Cunningham* during the joint lives of herself and *Frederick Nixon* to have, receive, and take the rents, issues, and profits, and to expend, interest, or other yearly emoluments to arise from, for her own sole and separate use, without being subject to the debts or interference of *Frederick Nixon* or his estate, after the decease of *Frederick Nixon*, in trust for *Frederick Nixon* and *Cunningham* and her assigns, during her life, in

should survive him ; and after the decease of *Harriet Cunningham*, in trust to settle and assure one moiety of the said property for the children of *Harriet Cunningham* by her first marriage, then living, in such shares, manner, and proportions as she should by deed or will, notwithstanding her coverture, appoint ; and, in default of such appointment, then for the present children of *Harriet Cunningham* by her former marriage, to be divided between them equally, share and share alike, and to be paid to them at the times therein mentioned : and in case neither of the said children should be then living, then in trust for the sole use and benefit of *Harriet Cunningham*, her executors, administrators, and assigns. And as to the other moiety of said property, it was agreed that same should be vested in the trustees in trust for the sole and absolute use of *Harriet Cunningham*, to be disposed of by her in such manner as she might direct, limit, and appoint, by any deed or deeds, during her coverture, or by any will to be duly executed by her, notwithstanding her coverture : and, in default of any such appointment, then in trust, from and after the death of *Harriet Cunningham*, to settle and assure said last mentioned moiety of said property to and amongst the children (if any) of the intended marriage, share and share alike, if more than one ; but if only one such child, then in trust for such only child : and in case there should be no child of the intended marriage, then in trust from and after the death of *Harriet Cunningham*, for the sole use and benefit of *Frederick Nixon*, his heirs, executors, administrators and assigns. And in case it should happen that no person should become entitled to any of the property under the provisions of the power of appointment aforesaid, then the entire of the said property, of what na-

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ture or kind soever, to be settled and assured to and separate use of *Harriet Cunningham* ; with her to dispose of it by her last will and testament withstanding her coverture. The settlement contained power authorizing the investment of the trust-fund in the purchase of real or freehold estate, to be settled for the same uses.

After the marriage had taken place, *Harriet Nixon* came entitled to various sums of money, amounting in the whole to 3904*l.* ; which was invested in Government securities upon private security, in the names of the trustees of the settlement.

The present bill was filed by *Harriet Nixon* against her husband and the trustees of the settlement, stating that she, being desirous to obtain and use the power by the settlement reserved to her, had applied to the trustees to hand over to a trustee for her, one moiety of the trust monies ; and offered to indemnify them for so doing ; they had refused to comply with her request without the directions of the Court. The bill prayed that an order might be taken of all sums of money which had been paid upon her, or to which she had become entitled, since her marriage, and which had come to the hands of the trustees, and that one moiety thereof might be by them paid over to such person as she might appoint ; she undertook to execute such deed of assignment or appointment as the Court might direct.

The trustees submitted to act as the Court might direct.

Mr. Longfield and Mr. H. Lewis for the plaintiff.

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Mrs. Nixon has, under the settlement, an absolute power of disposition over one moiety of the trust funds. The doubt arises from the circumstance that the conveyance has separated her life interest in the fund into two portions; one of which, that for the joint lives of herself and her husband, is given to her for her separate use: the other, viz., that to herself for life after the decease of her husband, is not so limited. The only question is, whether she has power to dispose of that portion of her interest in the trust funds which is limited to her after the death of her husband: for *Acton v. White(a)*, *Sturgis v. Corp(b)*, *Barford v. Street(c)*, *Major v. Lansley(d)*, and *Lynn v. Ashton(e)*, establish that the plaintiff has an absolute power of disposition over whatever is given to her for her separate use in possession or remainder, or over which she is given a disposing power by deed. If the trust funds were invested in the purchase of real estate, Mrs. Nixon could convey her whole life interest in them; and it is reasonable to infer that it was intended she should have the same power over the trust monies. There is no clause against alienation in this settlement; therefore the cases which have turned upon the effect of such a clause do not apply: nor do the cases which have been decided upon the effect of a power to a *feme covert* to dispose of the *corpus* of an estate by will; for here the power authorizes a disposition by deed; therefore *Stiffe v. Everit(f)*, and other cases of that class, do not apply. *Richards v. Chambers(g)* is the case most opposed to the claim of the plaintiff: there a

(a) 1 S. & St. 429.

(e) 1 R. & M. 188.

(b) 13 Ves. 190.

(f) 1 M. & Cr. 37.

(c) 16 Ves. 135.

(g) 10 Ves. 580.

(d) 2 R. & M. 355.

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personal fund was settled in trust for the separate use of the wife for life, and if she survived her husband it was absolutely her's ; if she died in his life-time, it was to be divided among such persons as she should by deed or will appoint ; in default of appointment, to her executors ; and Sir R. Grant held that she could not transfer the interest in the fund given to her in the event of her surviving her husband. But at that time it was not known how far clauses of anticipation were valid ; and the case cannot be relied on as a conclusive decision on the point. *Box v. Box* (referred to).

Mr. *Wiley* for the trustees.

Judgment. THE LORD CHANCELLOR :—

The parties to the settlement seem to have been ignorant of the legal effect of the limitations inserted in it. In the settlement, certain other property, to which the wife was entitled *in presenti*, was settled upon her for life, for her sole and separate use, and for which her receipts were to be discharges ; and after her decease upon certain trusts : but this portion of the property was settled in a different way. It was limited in trust for the separate use of the wife during the joint lives of herself and her husband ; and if she should survive him, then in trust for her and her assigns for his life ; and after her decease, for her sole use, to be disposed of by her in such manner as she should by deed or will, notwithstanding her coverture, &c. What objection is there to such a limitation ? There

(a) Drury, 42.

tion of union or merger of interests ; but during one
 tion of her life it is settled to her separate use, and
 ng another portion it is not so settled. But though
 as given to her for her separate use, during the joint
 of herself and her husband, so as, during the cover-
 to exempt it from the control of her husband, yet it
 ars that it was the intention of the parties that she
 ld not have power to alienate it absolutely during his
 and therefore, after the determination of the cover-
 it was given to her for life, but not for her separate
 the consequence of which is that her life estate, which
 arise after the coverture is determined, cannot, during
 overtore, be in any manner affected. For it being
 terest to arise upon the decease of the husband, it was
 in his power to affect it ; nor was it in her power,
 she was not empowered to dispose of it. It is a
 non limitation. The estate is given to the wife for
 eparate use during the joint lives of the husband and
 ; and after the decease of either of them, to the
 vor. The wife, in the present instance, takes an inte-
 for her separate use, during the joint lives of herself
 er husband, with a remainder, if I may so call it, to
 lf for life, expectant upon the determination of the
 : for the joint lives ; which cannot be affected by her
 und, and over which she herself has, during the cover-
 no dominion. The bill must, therefore, be dismissed,
 costs.

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MURPHY v. O'SHEA.

June 3.

If, in a transaction between principal and agent, it appears that there has been any underhand dealing by the agent, *ex gr.* that he has purchased the estate of the principal in the name of another person, instead of his own,—however fair the transaction may be in other respects, it has no validity in a Court of Equity.

To set aside a sale from a principal to his agent, it is not necessary to show that it was made at an undervalue.

An agent may purchase from his principal, provided he deals with him at arm's length, and after a full disclosure of all that he knows with respect to the property.

MARGARET SHEE, being seised in fee, or otherwise well entitled to several houses and premises in the city of Kilkenny, which were let to tenants of the names of *Laffan, Reynolds, Dollard, and Kavanagh*, for long terms of years, devised them, after the decease of two persons named in her will, to her cousin, *Gerard Murphy*, and his heirs; and died in 1794. In 1814 *Gerard Murphy* became entitled to the possession of the devised estates, the prior life estates having determined. He was at that time, and for many years previously had been resident at Mahon, in the island of Minorca, and afterwards resided at Cadiz, where he carried on business as a wine merchant; and being unable personally to attend to the management of the property so devised to him, or to make himself acquainted with its circumstances, he appointed Mr. *Patrick Byrne* to be his agent to receive the rents, and otherwise to manage the property for him. Mr. *Byrne* represented to Mr. *Murphy* that the property was not satisfactorily circumstanced; that the rents were not well paid; that the houses were old and out of repair, and that it would be for his advantage to sell it; and the latter, adopting that opinion, in November, 1820, executed a power of attorney, authorizing Mr. *Byrne* to sell the houses in Kilkenny, and to execute conveyances to the purchaser; and Mr. *Byrne* afterwards became the purchaser of them under the circumstances mentioned by the Lord Chancellor in giving judgment in this case.

Gerard Murphy died in 1834, having, by his will, devised all his real estates to his two sons, the plaintiffs, and

his daughter, and their heirs, as tenants in common, in remainder after a life estate therein, which he gave to his widow.

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Patrick Byrne died in July, 1842; and by his will, he devised the lands in question to the Rev. *Robert O'Shea* and *Richard Smithwick*, upon trust for certain pious and charitable purposes therein expressed; and appointed them his executors. The Rev. *Robert O'Shea* alone proved his will.

The bill was filed by the two sons of *Gerard Murphy* against the Rev. *Robert O'Shea*, *James Bergin*, and others, praying that the deeds of the 25th of May, 1829(a), and 11th of July, 1833(b), in the bill mentioned, might be set aside, having been obtained by fraud and imposition; and that same might be delivered up to be cancelled: or that the same might be reformed, by omitting therefrom the premises called *Kavanagh's* holdings.

Mr. Sergeant *Warren*, Mr. *Monahan*, and Mr. *Edward Pennefather*, for the plaintiffs. Argument.

Mr. *Moore*, Mr. *Brewster*, and Mr. *Gibbon*, for the Rev. *Robert O'Shea*.

Mr. *O'Donnell* for *Richard Smithwick*, who disclaimed.

Mr. *Kellet* and Mr. *Lawson* for *James Bergin*.

Mr. *John Pennefather* for *Teresa Murphy*, *Thomas Valls*, and *Emilia Valls*, otherwise *Murphy*, his wife.

(a) Conveyance from *Murphy* to *Bergin*.

(b) Conveyance from *Bergin* to *Byrne*.

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Whitcomb v. Minchin(a), and *Morse v. Royal*(b), w
referred to.

Judgment. THE LORD CHANCELLOR :—

An objection has been made to granting the relief sought on the ground of the lapse of time which has occurred since the transaction in question ; but I am of opinion that the plaintiffs are not barred of relief by *laches*, if they be otherwise entitled to it. It is also said that there is no proof that the lands were sold at an undervalue ; but it is perfectly well settled, that it is not necessary to prove undervalue. A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property. Then it is said that the deed of sale has been registered : that amounts to nothing, and I may observe, that the Registry Act rather facilitates fraudulent transactions ; for the registration of a fraudulent deed seems, in the eyes of the world, to give validity to which, if not registered, it would not have possessed.

This case, therefore, must depend on its merits, which are these. *Murphy* appears to have been the intimate friend of *Byrne*, who resided in this country. In his letters *Byrne* constantly addressed him as “my dear friend.” *Murphy* was resident in Spain ; and having become entitled to some property in the city of Kilkenny, consisting of houses which required to be looked after, he appointed his friend *Byrne*, to be his agent, to collect his rents and manage

(a) 5 Mad. 91.

(b) 12 Ves. 355.

property : and upon a representation that it would be for his advantage to dispose of his interest in these houses, he, in 1820, gave a power of attorney to *Byrne*, authorizing him to sell them in such manner as he should deem best. *Byrne* thereby obtained complete dominion over the property. He very soon began to depreciate it : he generally described it, in his letters to *Murphy*, as “ them old ones ;” and he represented the title as being in hazard, that the Marquis of *Ormonde* alleged that the property was held under him by lease for lives, and not by fee-farmment. Under these circumstances, and as the tenants were irregular in the payment of their rents, *Murphy* became anxious to dispose of the property. *Byrne* was equally anxious to become the purchaser of it ; but he proceeded with great caution. He suggested that he should become the purchaser, and *Murphy* assented ; but *Byrne*, in reply, said, that there was a rule of law which prevented him, as agent, from becoming the purchaser. This, therefore, was the case, not merely of an agent who had his principal in power, but one in which the agent had full knowledge of the rule of the Court ; which, however, does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm’s length, and after full disclosure of all that he knows with respect to the property.

At length, in December, 1826, *Byrne* wrote to his principal, stating, that he had been speaking to a Mr. *Bergin*, who, he said, had got a good fortune lately with his wife, and expressed a desire to lay out his money in purchasing houses ; and that he proposed a sale of *Laffan’s*, *Wolds’*, and *Dollard’s* holdings to him : and added, “ Let me now your inclination concerning them, as soon as you

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can, and the lowest purchase you would let them go at. will, at the same time, get as much for you over it as I can. That would be a fair question to ask, provided *Bergin* was really the purchaser; but it turns out that *Bergin* was *Byrne*; and, therefore, it was most unfair in *Byrne* to ask such a question of his principal. In April, 1828, the sale was agreed on; and by indenture of the 25th of May, 1828, *Byrne*, as the attorney of *Murphy*, conveyed the property to *Bergin*, in consideration of 800*l.* of the late Irish currency. But what was the fact, as regards the circumstances of *Bergin*, the pretended purchaser? He was in possession of a small farm of forty acres of land, of indifferent quality, held under *Byrne* himself at a rack rent; and he had received a sum of 100*l.*, which he got as a fortune with his wife. It was untrue, therefore, that *Bergin* had money to lay out in the purchase of lands, as was represented by *Byrne*. And then come these extraordinary circumstances. *Bergin*, in his answer, says that he had nothing to do with the purchase; that he knew nothing about it; but that *Byrne* came to him and told him this story:—that when he, *Bergin*, was about nine years of age, his father had deposited with him, *Byrne*, a sum of between 300*l.* and 400*l.*, a matter which he had never before disclosed; and that he thought it would be beneficial for *Bergin* if he would lay out that money in the purchase of this property; that it was a desirable property; and that, as the purchase-money of it was double what *Bergin* had, he, *Byrne*, would advance the remainder, and enter into possession and repay himself. *Bergin* must have perfectly well understood what was the meaning of that transaction, and that the conveyance was executed to him as a trustee, his name being used merely for the purpose of defrauding *Murphy*. Without doubt, the purchase was made with *Byrne's* money; and *Bergin* never received

the rents for his own use : *Byrne* received them ; but sometimes through the hands of *Bergin*. As soon as the matter was so far arranged, *Byrne*, the real purchaser, became desirous to have the title vested in himself ; and he adopted his mode of obtaining his object. He put forward this allegation,—and, I infer, did so fraudulently : I infer anything which the facts will warrant against a man in the situation of *Byrne*. The Court does not presume fraud ; but it may be compelled to come to the belief that fraud does exist in one part of a transaction, where actual fraud is proved to exist in another part of the same transaction. He represented to *Murphy* that he had, by mistake, permitted him to convey to *Bergin*, under the description of the premises in the conveyance, another property of *Murphy's*, viz., *Kavanagh's* holdings, as part of the property sold ; that *Bergin* was dissatisfied with his purchase, and desired to get back his money ; that he was not aware of the mistake in the conveyance ; that it was most important to obtain a re-conveyance of the property from him ; and, in order to get rid of his complaints, he, *Byrne*, would take an assignment of the premises from him, provided *Murphy* particularly requested him to do so. The result was, that *Murphy* became alarmed, and gladly consented that *Byrne* should purchase the property. *Byrne* accordingly procured a conveyance of it to himself ; and then, after that purchase had been made by *Byrne*, as *Murphy* believed, though it was all a sham, *Murphy* wrote to him, saying that he approved of his making it. But why did he approve of that purchase both before and after it was made ? In one of his letters, written before the purchase was made, he requests *Byrne* to take a re-assignment of the premises on his own account, stating his belief that he was “highly worthy of his confidence :” and *Byrne* having written to him, that, agreeable to his desire

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and request, he had "effected and purchased the assignment and conveyance of them old tenements in High-street, Kilkenny," from *Bergin*, and had thereby secured for him, free from litigation, whatever might be the fair value of *Kavanagh's* holdings; and offering to purchase them for 260*l.*, *Murphy* in reply says, "Your letter of the 17th last July, is highly satisfactory to me, for your having effected and purchased the assignment and conveyances, &c., from Mr. *Bergin*, as it secures for me, free from litigation, the fair value of the widow *Kavanagh's* house. I therefore very willingly accept your offer to pay me the sum of 260*l.* for said interest;"—which offer, however, never was carried into effect. But if *Murphy* had been told that this was all a trick; that *Bergin* was *Byrne*; that the whole was but a contrivance to impose on him and cheat him;—would he have written those letters, or addressed him as his "most dear friend?" It is now attempted to use those letters as a confirmation; but they are the strongest evidence of fraud, and show the want of knowledge in the principal, and the want of proper conduct in the agent.

Bergin, in his answer, swears, that he never executed any deed re-assigning the premises to *Byrne*; that the deed of July, 1833, is a fabricated instrument; and that no part of the consideration-money, mentioned in that deed, was ever paid to him. There are three witnesses to the execution of the deed by him, and to his receipt for the money endorsed on it; but no evidence has been given of the actual payment of the consideration-money. The only witness examined merely says, that the name subscribed is his handwriting, and that he is sure that no person paid any money to *Bergin* in his presence. The evidence, then, being all one way, I must believe that no money was paid on that occasion.

Whether the deed was executed by *Bergin* or not, I cannot say; this only is certain, that the whole transaction was a contrivance and a fraud on the part of the agent. Receipts by *Bergin* have been given in evidence, to show that possession went along with the title; but they prove something more; for one of them is for rent subsequent to the pretended re-conveyance: I am, therefore, inclined to think that the title may be still in *Bergin*. It is observable, looking at the pretence put forward by *Byrne* for getting the re-conveyance, that, after he had obtained it, he never executed a conveyance of *Kavanagh's* holdings to his principal as he ought to have done. The consequence is, that *Byrne*, having been brought to desire to set himself right in some measure in this dishonourable transaction, devised this property to pious uses; and the persons entitled under his will find themselves compelled to insist on his title to *Kavanagh's* holdings. By his misconduct throughout, he has rendered this suit necessary; for which reason his assets will have to bear all the costs.

One thing admits of no dispute: the moment it appears in a transaction between principal and agent, that there has been any underhand dealing by the agent,—that he has made use of another person's name as the purchaser, instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in this Court.

I have no hesitation in making a decree for the plaintiffs, setting aside the deeds, with costs to be borne by the defendant, *O'Shea*, the personal representative of *Byrne*. And though I do not desire to give costs to any person connected with such a transaction, yet, as it appears that *Bergin* was a mere tool in the hands of *Byrne*, whose assets

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are ample, I will direct his costs to be paid by the plaintiffs to have them over against *O' Shea*.

Decree.—Let the indentures in the pleadings men bearing date the 25th day of May, 1829, and the 11th July, 1833, be set aside ; and let the same be delivered be cancelled. Refer it to the Master to take an account purchase-money, with interest at 5*l.* per cent. per a and also an account of the rents and profits of the p in the bill mentioned, received by *Patrick Byrne* in named, in his life-time, from the 25th day of March or by the defendant, the Rev. *Robert O' Shea*, as executor, since his decease ; or by any other person or by their or either of their order, or for their or either use : and let the amount of the purchase-money be against the amount of the rents and profits as aforesaid if the amounts of the rents and profits as aforesaid exceed the amount of the purchase-money, let the balance paid out of the assets of the said *Patrick Byrne*, debt but in case a balance should be found due from plaintiffs respect of the purchase-money and interest thereon, plaintiffs be at liberty to retain same in part liquidate the costs hereby decreed to them : and let the defendants *Robert O' Shea*, *Richard Smithwick*, and *James* execute a re-conveyance of the premises comprised in said indentures of the 25th of May, 1829, and the July, 1833. And the defendant, *Robert O' Shea*, and the assets of the said *Patrick Byrne*, let him pay all the suit ; and let the costs of the defendant, *Bergin*, the defendants, *Teresa Murphy*, *Thomas Valls* and *Valls*, otherwise *Murphy*, his wife, *Richard Smithwick* the Attorney-General, be paid by the plaintiffs ; and plaintiffs have the same over with their own costs

the defendant, *Robert O'Shea*. And let the Master, in taxing the costs of the said defendant, *Richard Smithwick*, only allow him the same costs as he would have had, if he had simply disclaimed.

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BATTERSBY v. ROCHFORD.

May 28, 29.
June 3.
1846.
January 29.
February 13.

UPON the marriage of *William Rochford* with *Elizabeth Sperling*, a settlement dated the 13th of May, 1788, was executed, whereby *William Rochford* conveyed the lands of Mallinstown and Belfield, in the county of Westmeath, to the use of himself for his life; and, after his decease, to the use, intent and purpose that *Elizabeth Sperling* and her assigns, should receive and enjoy, out of the said

A. being entitled to lands in Ireland, was discharged in England as an insolvent debtor, under the 1 Geo. IV., c. 119. The assignment of all his estate and effects to the Provisional Assignee was

made in the Insolvent Court, but was not registered. The sub-assignment to the general assignee was registered. Afterwards *A.*, by deed duly registered, conveyed his Irish estates, in mortgage, to *B.*, who had no notice of the insolvency. The title of the mortgagee is to be referred to that of the assignees of the insolvent.

E. being entitled to an annuity of 480*l.*, issuing out of the lands of *X.*, of which her son, *A.*, was seized in fee, upon her marriage, in 1801, with *W.*, executed a settlement, whereby, after reciting that the clear annual rents of *X.* did not, upon an average, exceed the sum of 240*l.*, and were, therefore, insufficient to answer the accruing payments of the annuity, she assigned the annuity, and all arrears and future payments thereof, to trustees, upon trust, that if *A.* should attain the age of twenty-one, the trustees should thenceforth, during the joint lives of *E.* and *A.*, thereout pay him a certain annuity; with a proviso for its cesser or abatement in case *A.* should become entitled to an annual income of equal or lesser amount: and, subject hereto, to receive so much and such part of the annuity of 480*l.* as the clear yearly rents of *X.* should, from time to time, be sufficient to pay; and pay the same to *W.*, and to *E.*, after the death of *W.*: and to stand possessed of the arrears then due, and thereafter to become due, of the annuity, in consequence of the rents of *X.* being insufficient to answer same, upon trust, if *A.* should attain twenty-one or marry, and survive *E.*, to release the lands from the arrears due at the time of the settlement, or thereafter to become due: and if *A.* should either die in the life of *E.*, or should survive *E.*, and die under twenty-one and without having been married, to stand possessed of the arrears upon such trusts as *E.* should appoint; and, in default of appointment, to call in and enforce payment thereof, and invest same, and pay the interest hereof to *E.* for life; then to *W.* for his life; and then the principal to the children of *E.* and *W.*, equally. And it was declared that in the meantime, and until, under the trusts, the arrears should either become absolutely vested in *A.*, or become absolutely subject to the appointment of *E.*, the trustees should forbear from requiring or enforcing payment of the arrears. *A.* attained the age of twenty-one years: *W.* died. Afterwards, the rents of *X.* amounted more than 480*l.* per annum:—*Held*, *E.* and *A.* being both living, that the surplus rents, after paying the accruing gales of the annuity, were properly applicable to the payment of the arrears which accrued since the settlement of 1801.

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 —
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lands, the clear yearly sum of 480*l.* for the term of years as and for her jointure; the same to be paid quarterly power of distress and entry for recovery thereof: and ~~therein~~, and to a term of ninety-nine years, vesting upon trust to secure the payment of the annuity to a further trust term of 500 years, the trusts of which not arise, the lands were limited to the use of the issue of the marriage and the heirs of his body, with several reservations over.

There was issue of that marriage one child only defendant, *William Henry Rochford*.

William Rochford died in 1798; and in 1801, *William Rochford*, his widow, married the Rev. *William Beville* and upon the occasion of that marriage, a settlement the 5th of February, 1801, was executed between *William Beville* of the first part, *Elizabeth Rochford* of the second part, and trustees of the third part; wherein reciting the title of *Elizabeth Rochford* to an estate for term of her life in certain lands therein mentioned the jointure annuity of 480*l.*, and also to another annuity of 138*l.* 10*s.* during her life; and that the clear annual income of the lands and hereditaments charged with the payment of the said annuity or sum of 480*l.* to *Elizabeth Rochford* during her life, by the indenture of the 13th of March 1798, did not, upon an average, exceed the sum of 240*l.*; and therefore, insufficient to answer the accruing payment of the said annuity; *Elizabeth Rochford*, in consideration of the intended marriage, and with the approbation of the intended husband, demised the first-mentioned lands to the trustees, for the term of ninety-nine years, if she should long live: and also granted and assigned to the said

tees, the said annuity or yearly sum of 480*l.*, by the indenture of the 13th of May, 1788, limited to the use of the said *Elizabeth Rochfort* and her assigns for her life, and all arrears and future payments thereof, and all the powers and remedies of her, the said *Elizabeth Rochfort*, for recovering and enforcing the payment thereof, and all her estate, &c., in and to the same : to hold the said annuity or yearly sum of 480*l.*, and the arrears and future payments thereof, upon the trusts thereafter expressed concerning the same. And *Elizabeth Rochfort* also assigned to the same trustees the annuity of 138*l.* 10*s.*, and the arrears and future payments thereof. And it was declared that the trustees should stand possessed of the lands demised to them, and also of the annuity of 480*l.*, and the arrears and future payments thereof, and also of the annuity of 138*l.* 10*s.*, and the arrears and future payments thereof, upon trust (after the solemnization of the marriage), that if *William Henry Rochfort*, the son of *Elizabeth Rochfort*, should attain the age of twenty-one years, then the trustees should thenceforth, yearly and every year during the joint lives of *Elizabeth Rochfort* and *William Henry Rochfort*, by and out of the yearly rents of said lands and by and out of said annuities, levy and raise one annuity or clear yearly sum of 100*l.*, and pay same quarterly to *William Henry Rochfort* and his assigns, for his and their use. Provided always that if *William Henry Rochfort* should, at any time during the joint lives of him and *Elizabeth Rochfort*, become entitled to any annual sum of money, or any estate, property or provision whatsoever, during his life or for any greater estate or interest whatsoever, then in that case, if the annual sum, or the estate or provision to which he should become entitled as aforesaid, should amount to or produce the annual sum of 100*l.* or upwards, the annual sum of

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100*l.*, thereby directed to be raised and paid *Henry Rochfort* and his assigns, for the lives *Elizabeth Rochfort*, as before mentioned, should be no longer payable ; but if the annual sum, or property or provision, to which he should so be entitled, should amount to or produce less than sum of 100*l.*, then so much of the annual sum thereby directed to be levied and paid to *William Rochfort* and his assigns during the joint lives *Elizabeth Rochfort*, should cease and be no longer as the annual sum or produce of the estate, property or provision, to which *William Henry Rochfort* should be entitled, should amount to. The trusts of the annuity of ninety-nine years, and of the annuity of 138*l.* then declared to be for the Rev. *William Beville* during the joint lives of himself and *Elizabeth Rochfort* should die in her life-time, then in trust for *Elizabeth Rochfort* and her assigns. And as to the annuity of 48*l.* agreed that, subject and charged as before mentioned, the trustees should, during the joint lives of *Elizabeth Rochfort* and *William Beville*, receive and take so much part of the said annuity or yearly sum of 48*l.* yearly rents, issues, and profits of the lands and tenements charged with the payment thereof, as from time to time be sufficient to pay and satisfy the said part of said annuity or yearly sum. And from time to time, the same should be received by the trustees, as therein before mentioned, unto the death of his assigns, for his and their own proper use and behoof, if *William Beville* should depart this life before the death of *Elizabeth Rochfort*, then that the trustees, from the time of the decease of *William Beville* until the death of *Elizabeth Rochfort*, receive

such part of said annuity, or yearly sum of 480*l.*, as the clear yearly rents and profits of the lands and hereditaments charged with the payment thereof, should from time to time be sufficient to pay and satisfy ; and should pay the said part of the said annuity or yearly sum, when and as, from time to time, the same should be received by the trustees, as thereinbefore mentioned, unto *Elizabeth Rochfort* and her assigns, for her and their proper use and benefit. And it was declared that the trustees should stand possessed of and interested in the arrears then due and owing of the said annuity or yearly sum of 480*l.*, and also of and in all the arrears which should thereafter accrue or become due of the said annuity or yearly sum of 480*l.*, in consequence of the rents, issues, and profits of the lands and hereditaments charged therewith being insufficient to answer the same, upon trust, if *William Henry Rochfort* should attain the age of twenty-one years or marry, and should survive *Elizabeth Rochfort*, then, immediately after the decease of *Elizabeth Rochfort*, and *William Henry Rochfort* attaining the age of twenty-one years, or marrying, that the trustees should, by good and effectual conveyances, release, exonerate, and discharge all and singular the lands and hereditaments charged with the annuity or yearly sum of 480*l.*, of and from the said arrears, at the time of the settlement due, or theretofore to become due, as thereinbefore was mentioned, for and in respect of the said annuity or yearly sum of 480*l.* ; and of and from all powers and remedies for recovering and enforcing payment thereof. And upon further trust, that if *William Henry Rochfort* should either depart this life in the life-time of *Elizabeth Rochfort*, or should survive *Elizabeth Rochfort* and depart this life under the age of twenty-one years, and without being or having been married, then and in that case the trustees

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should stand possessed of and interested in the arrears then due, and thereafter to become due, as thereinbefore mentioned, of said annuity or yearly sum of 480*l.*, upon and for such trusts and purposes as *Elizabeth Rockfort* should by deed or will appoint; and in default of such appointment should call in and enforce the payment of the said arrears, and lay out and invest the money which should come to their hands for or in respect of the same, in the public funds or on real securities, and pay the interest and annual produce thereof to *Elizabeth Rockfort* for her life; and, after her decease, to *William Beville* for his life; and, after the decease of the survivor of them, in trust for the children of *William Beville* and *Elizabeth Rockfort*, who should attain the age of twenty-one years, or marry, in equal shares; and if but one child, in trust for such child; and if no child, in trust for the survivor of *William Beville* and *Elizabeth Rockfort* absolutely. And it was further declared that, in the mean time, and until, under the trusts thereinbefore declared, the said arrears of the said annuity of 480*l.* should either become absolutely vested in *William Henry Rockfort*, his executors, administrators and assigns, or become absolutely subject to the appointment and disposition of *Elizabeth Rockfort*,—the trustees should forbear from requiring or enforcing payment of the said arrears.

William Henry Rockfort attained the age of twenty-one years; and, in Michaelmas Term, 1819, suffered a recovery of the lands in the settlement of 1788: which, by deed of the 18th of June, 1819, made between *William Beville* and *Elizabeth Beville*, his wife, of the first part; *William Henry Rockfort*, of the second part; and certain other persons of the third and fourth parts; (being the deed making the tenant to the *præcipe*), was declared to enure for assuring and con-

firming to the trustees in the deed of 1801, the said annuity of 480*l.*, and all the arrears and future payments of the same, and powers for enforcing payment thereof, and the trusts declared of the same, by the indenture of the 5th of February, 1801; and, subject thereto, to the use of *William Henry Rochfort*, his heirs and assigns.

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In 1822 the Rev. *William Beville* died; and in 1827, *Elizabeth Beville*, his widow, married General *Charles Brown*, who died in 1836, leaving his wife surviving.

In 1821 *William Henry Rochfort* was discharged as an insolvent debtor in England. On the 21st of July, 1821, he executed an assignment of all his real and personal estate to the Provisional Assignee of Insolvents in England; who, by deed of the 17th of February, 1823, assigned same to *William Gustard* and *Charles Smith*, the assignees of the estate and effects of the insolvent.

By indenture of the 30th of March, 1841, *William Henry Rochfort* mortgaged the lands to *Thomas Battersby*, the plaintiff, to secure the repayment of a sum of 3000*l.*, then advanced by him to the mortgagor. This mortgage was duly registered on the 30th of March, 1841. The money lent was also secured by the bond and warrant of *William Henry Rochfort*, upon which judgement was entered, as of Hilary Term, 1841.

The bill was filed by *Thomas Battersby* against *William Henry Rochfort*, *Elizabeth Brown*, *William Gustard*, *Charles Smith*, and others. It stated, in addition to the foregoing matters, that, some time in the year 1835, in consequence of the expiration or eviction of a certain lease, to

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which the lands had been subject, the yearly rents and profits thereof very much increased, and yielded ever since the last-mentioned period, rents and profits to the amount of 1100*l.* and upwards, and far more than sufficient to discharge the annuity of 480*l.* ; to which surplus rents and profits *William Henry Rochford* was entitled ; and that *Elizabeth Brown* was in receipt of the rents of the lands and that she insisted that she was entitled to continue in receipt of the whole of such rents, and apply the surplus thereof, over and above the amount of her jointure, towards the discharge of the arrears thereof, which accrued before this increase of the rental of the lands and while the rents thereof were insufficient for the payment of the jointure : whereas, the plaintiff submitted that she was precluded by the deeds of February, 1801, and June, 1819, from receiving or recovering out of the lands the said arrears, during the life of *William Henry Rochford*, or unless or until she should survive *William Henry Rochford* ; and that he, the plaintiff, was entitled to have the mortgaged premises sold, subject to the jointure, for liquidation of his mortgage debt ; and in the mean time to have a receiver appointed ; to the end that the rents and profits might be applied, in the first instance, to the payment of the accruing calls of the jointure ; and, subject thereto, to the liquidation of the principal, interest, and costs due to the plaintiff on foot of his mortgage and securities collateral therewith. The plaintiff also charged by his bill, that the assignments by *William Henry Rochford* to the Provisional Assignee, and by the latter to the general assignees, were not registered in the Office for Registering Deeds in Ireland ; and that, at the time of the execution of the mortgage of 1841, and when he lent the 3000*l.* on the security thereof, he had no notice of these assignments, or of the insolvency of *William*

Henry Rochfort. The bill prayed a foreclosure and sale, subject to the annuity; and for the appointment of a receiver; and that the rents and profits might be applied, in the first instance, in payment of the accruing gales of the jointure of 480*l.* to *Elizabeth Brown*, and, subject thereto, to the liquidation of the plaintiff's debt and costs.

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Mrs. *Brown*, by her answer, said that, on the death of *William Rochfort*, the lands of Mollinstown produced only an annual rent of 240*l.* Irish, and the lands of Belfield an annual rent of 50*l.*: that, the annual rents being insufficient to pay the jointure of 480*l.*, she, on the death of *William Rochfort*, entered into possession of the lands, and had ever since continued in receipt of the rents thereof: that in 1833, having been informed that the surviving life in the lease of the 17th of March, 1770, under which the lands of Mollinstown were held, was dead, and that a renewal thereof, executed by *William Rochfort* in 1796, was not binding on her or on *William Henry Rochfort*, she and her husband, General *Brown*, caused an ejectment to be brought for the recovery of the lands, discharged of the renewal; which was tried at the Spring Assizes for 1835, when the jury found a verdict for the defendant, subject to several points reserved; which points were afterwards argued, and judgment was given for the lessors of the plaintiff: and she admitted that, in the year 1835, she got possession of the lands by virtue of the ejectment proceedings; and that thereupon the same were relet to the occupying tenants for the gross annual sum of 624*l.*, being the same amount of rent which had been previously received thereout by the defendant in the ejectment; and that, in 1837, a reletting of the lands took place, when the annual rental was increased to 841*l.* And she submitted that, according to the true construction of the settlement of

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1801, the yearly rents of the lands should be applied, after payment of the usual outgoings and the expenses of management, in the first place, in keeping down the accruing payments of the annuity of 480*l.* from the time of the letting; and that the surplus rents should be paid to her, to be applied towards satisfaction of the arrears of the annuity, which accrued since the date of the deed of February, 1801; and that, after satisfaction of such arrears, and not before, the surplus rents should be received and retained by the trustees of the settlement of 1801, towards the satisfaction of the arrears of the said annuity, which were due at the time of the execution of that settlement: and that *William Henry Rochfort*, or any person claiming under him, was not entitled to the lands, or the rents or profits thereof, until after the entire of said arrears had been levied thereout. And submitted that she was not precluded by the deeds of the 5th of February, 1801, and 18th of June, 1819, from recovering the arrears out of the lands, during the life of *William Henry Rochfort*, or unless or until she should survive him; for that, notwithstanding those deeds, she was entitled to be paid out of the lands all arrears of the said annuity which accrued since the execution of the settlement of 1801; and that the clause in that deed alluded to, only applied to the arrears of the annuity due at the date of the settlement, and any subsequent arrears which might be due at the time of her death, in the life-time of *William Henry Rochfort*, and which arrears might be then due in consequence of a deficiency in the whole rents to discharge the entire annuity and the arrears thereof, which should have accrued since the date of said settlement: and that there was nothing in the settlement to preclude her from not permitting any sum to remain due for arrears at the time of her death, provided the rents were sufficient to

my same; but that, on the contrary, she was entitled to have the entire amount of the rents remaining after payment of the accruing gales of the annuity, applied in discharge of said arrears: and that the deed of 1801 was only to operate upon the arrears of the annuity due at the time of its execution, and any arrears which might be due at the time of her death, in case there should be any such, occasioned by a deficiency in the entire rents of the lands to discharge the same during her life-time.

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No evidence was given in relation to the lease of 1770, or the ejectment of 1835. It appeared that the assignment from *William Henry Rochfort* to the Provisional Assignee had not been registered; but that on the 23rd of April, 1830, there had been filed, in the Office for Registering Deeds in Ireland, a document purporting to be a memorial to be registered pursuant to the Act, of an indenture bearing date the 17th of February, 1823, made between *Henry Dance*, the Provisional Assignee of the Estate and Effects of Insolvent Debtors in England, pursuant to the 1 Geo. IV. c. 119, of the one part, and *William Gustard* and *Charles Smith* of the other part; whereby, after reciting that by indenture dated the 21st of July, 1821, made between *William Henry Rochfort*, an insolvent debtor, then a prisoner in the King's Bench Prison of the one part, and said *Henry Dance*, as such Provisional Assignee, of the other part, all the estate, right, title, interest, and trust of the said insolvent, in possession, reversion, remainder, or expectancy, except the wearing apparel and necessities therein mentioned, were conveyed and assigned to *Henry Dance*, as such Provisional Assignee, his successors and assigns; he, the said *Henry Dance*, did convey, assign, transfer, and set over unto *William Gustard* and

1845. *Charles Smith*, their heirs, executors, &c., all the estate, title, interest, and trust of, in, and to the real and personal estate, whatsoever and wheresoever, which by virtue of the therein-recited indenture were vested in *Henry Dance*; to hold to them, their heirs, executors, &c., according to the respective natures, properties, and tenures thereof. The assignments from *William Henry Rochfort* to the Provisional Assignee, and from the latter to the general assignees, were duly filed as of record in the Court for the Relief of Insolvent Debtors in England, pursuant to the 1 Geo. IV. c. 119, s. 7.

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Argument. Mr. Moore, Mr. Monahan, and Mr. Hutton, for the plaintiff.

The mortgage has priority over the assignment to the provisional and general assignees, by virtue of its prior registration. The 6 Anne, c. 2, is general in its provisions, and applies to all conveyances of lands in Ireland, whether executed in Ireland or not. If, therefore, this were not the case of an assignment pursuant to an Act of Parliament, the priority of the plaintiff would be undoubted; for the registration of the assignment from the provisional to the general assignees does not operate as a registration of the assignment from the insolvent to the Provisional Assignee: *Lessee of Rennick v. Armstrong*(a); *Honeycombe v. Waldron*(b). Then does the 1 Geo. IV. c. 119, dispense with the necessity of registering the assignment to the Provisional Assignee? It does not do so expressly; and there is nothing in it which renders a registration of the assignment impossible. Similar assignments have been registered; *Sumpter v. Cooper*(c): and that the policy of the

(a) Hud. & B. 727.

(c) 2 B. & Ad. 23.

(b) Str. 1064.

Legislature was to have such assignments registered, appears from the last Insolvent Act, 1 & 2 Vic. c. 110, s. 46. We also submit that the 1 Geo. IV. c. 119, does not extend to lands in Ireland; and consequently that nothing in the lands in question passed to the assignee under the English insolvency: *Stern's case*(a); *Selkrig v. Davies*(b); *Ex parte Coles*(c). But if the Court should be of opinion that the assignment to the Provisional Assignee did not require to be registered, to give it priority, yet as the sub-assignment does require to be registered, and as the memorial of it does not specify the names of the lands, or the county, barony, parish, or townland in which they are situated, the registration of it is invalid; and the plaintiff is entitled to priority.

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Mr. *Sergeant Warren*, Mr. *Brooke*, and Mr. *Hunt* for Mrs. *Brown*.

Mr. *Battersby* and Mr. *De Moleyns* for William Henry Rochford.

Mr. *Rolleston* and Mr. *Graydon* for William Gustard and Charles Smith.

As by the 1 Geo. IV. c. 119, s. 7, every assignment, whether to a provisional or other assignee, must be filed in the Insolvent Court, it would be impossible to comply with the Registry Acts, which require the deed to be produced to the officer. The provision made by the 1 & 2 Vic. c. 110, s. 46, for the registration of the vesting order and the order

(a) 1 Rose App. 462.

(c) 2 Dea. & Ch. 100.

(b) 2 Dow, 230.

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for the appointment of assignees, shows the necessity of the enactment: the clause itself is, however, inaccurate in its terms, there being no register in Wales. The provision of the Registry Act, requiring the county, barony, parish, or townland, to be set out in the memorial, shows that it cannot apply to assignments to provisional or other assignees of an insolvent: for such assignments are always, in general terms, of all the insolvent's real and personal estate; and though a memorial of the assignment should be put on the file of the Registry Office, it would be useless, as it would not appear upon searches against lands: *Fury v. Smith*(a); *Warburton v. Ivie*(b). The 7 Geo. IV. c. 57, s. 19, was also referred to.

Mr. *Monahan* replied.

THE LORD CHANCELLOR expressed an opinion upon the construction of the settlement of 1801, unfavourable to the claim of Mrs. *Brown*; but having directed an inquiry to ascertain what lease of the estate existed at the time of the settlement of the 5th of February, 1801, and for what term, and for what rent, and all particulars in relation to said lease, and when such lease determined or was evicted, and under what circumstances; he, upon the return of the report, directed the cause to be reheard upon the question of the construction of that settlement. Upon the question upon the Registry Act, his Lordship pronounced the following judgment:

(a) 1 Hud. & B. 758.

(b) 6 Bli. 1; S.C. 2 D. & Cl. 480.

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THE LORD CHANCELLOR :—

I reserved the question upon the Registry Acts. It was properly admitted that if the assignment or conveyance from the insolvent to the Provisional Assignee ought to have been registered, the title of the plaintiff was to be referred to that of the defendants, as the registry of the conveyance from the provisional assignee to the general assignees could not operate as a registration of the conveyance to the Provisional Assignee, or amount by itself to a sufficient registration. I have, therefore, only to decide the question, whether it was necessary to register the conveyance to the Provisional Assignee.

The Registry Act here is general in the permission which it gives to register all deeds and conveyances by which any hereditaments may be in anywise affected; and priority is given to deeds according to the time of registration, over other registered documents; and any deed or conveyance, not registered, of any hereditaments comprised in a deed, a memorial whereof shall be registered, is made void against the registered deed and against judgment creditors. There is no exception of conveyances executed under the authority of Acts of Parliament, or required to be recorded elsewhere; and of course the Act, as several subsequent provisions show, was intended to comprise deeds executed out of Ireland. The opinion of the Judges in *Warburton v. Loveland*(a), as delivered in the House of Lords, after two arguments at the Bar, was, that the language of the Act throughout, and more particularly in the 1st section, seems to establish this to have been its leading

(a) 2 Dow & Clark, 496.

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object; that, as far as deeds were concerned, the Act should give complete information, and that any necessity of looking further for deeds than into the register itself should be superseded. And it was manifest, they said, that no construction of the Act is so well calculated to carry into effect this its avowed object, as that which forces all transfers and dispositions of every kind, and by whomsoever made, to be put upon the face of the register, so as to be open to the inspection of all parties who may at any time claim an interest therein. These observations, which I willingly adopt, apply with as much force to this case as to that in which they are delivered. Any conveyance by *William Henry Rochford* himself whilst solvent, although for his creditors, would have required registration to protect it against a subsequent registered deed. But it was argued that the provisions of the English Insolvent Act, which was in operation at the time of the conveyance (1 Geo. IV. c. 119), rendered a registration here unnecessary, not by express provision, but by implication. An insolvent was allowed by the Act to present a petition to the Court for his discharge, and he was required, at the time of subscribing such petition, to duly execute a conveyance and assignment in such manner and form as the Court should direct, of all his real and personal estate, so as to vest the same in the Provisional Assignee of the Court; which conveyance was to be void if the insolvent should not obtain his discharge; and if he should, proper persons were to be appointed as assignees, and the Provisional Assignee is directed to assign to them the previous estate and effects; and every such assignment, whether to a provisional or other assignee, is to be entered on the proceedings of the Court, and an office copy is made evidence. The circumstance that, when the insolvent cho

to file a petition for his discharge, it was incumbent upon him to convey his estate to the Provisional Assignee, of course would not operate as a repeal of the Registering Acts in the County. Such a conveyance, unregistered, would be open to all the mischiefs intended to be guarded against by those Acts, if it were to have precedence over a subsequent registered deed. The like mischief continuing, therefore, the like remedy should still be operative. But it was contended that the assignments were to be recorded in the Court, and, therefore, could not be registered; and, consequently, registration must be considered no longer necessary. The Act does not prescribe the time within which the assignments are to be entered upon the proceedings of the Court. It does not appear to me that this provision is inconsistent with the prior registration here of the deed, nor indeed do I know how the entering of the assignment on the proceedings of the Court would prevent the subsequent registration of the deed with the permission of the Court, which would have been given as of course. The Acts of Parliament may well stand together; and the requisitions of both might have been complied with; the assignments might have been registered here and also entered on the proceedings of the Insolvent Court in England. It would be contrary to settled rules of interpretation, therefore, to hold the latter to be a repeal of the former Act. It was said that the late Act of 7 Geo. IV. enabled the assignees, by having two parts of the assignment to them from the Provisional Assignee, to register one part fit; but this, I think, does not affect the question. And the provision in the 1 & 2 Vic. c. 110, s. 46, copied into our insolvent Act, I think clearly shows the impression of the legislature, that, under the prior Statutes, conveyances by

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an insolvent debtor to the Provisional Assignee, and from the latter to the particular assignee, would be subject to registration; and such was the anxiety of Parliament to further the object of these laws, that the vesting or other order, which came in lieu of a conveyance, is required to be registered just as the deed ought to have been. The evidence afforded by this provision, of the view taken of the former law by the Legislature when the late Act was passed, is not weakened by the criticism about the word Wales in the clause, if even that word was improperly introduced; but although there is no general registration Act in Wales, there may be laws requiring the registration of some particular deeds in certain localities. Upon the whole, I think it clear that the conveyance to the Provisional Assignee was subject to the general law as to registration in this country; and, therefore, that the claim of the plaintiff must prevail over the title of the assignees. The view which I have taken of the case renders it unnecessary to consider the other points upon the Registering Acts which were argued at the Bar.

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On the 14th of November, 1845, the Master made his report, pursuant to the order of reference before mentioned; and found that the Earl of *Belvidere* being seised in fee of Mollinstown, by lease and release of the 17th of March, 1770, demised the same to *Garrett Tyrrell*, for the term of three lives and the life of the survivor, and for the lives of the three persons whom the lessee should successively appoint in the place of the first three lives, upon their and each of their deaths, in the manner and under the restrictions and upon the payment of such fines, as thereafter mentioned, at the yearly rent of 223*l.* 6*s.* 2*d.*: and the

lessee covenanted that he, his heirs and assigns, would yearly, during the term, supply the Earl and his heirs with a specified number of cars, horses, labourers, and loads of straw, upon the terms therein mentioned; and could not sublet without consent, or upon default would pay a penal rent: and the Earl covenanted that if the lessee should, within one month after the fall of the first life, nominate a life in his place, the Earl would add that life to the term in the lease; but if the lessee should neglect to nominate said life within the month, then the Earl would, if a life being nominated within three months from the end of said month, and on payment of a fine of 100*l.*, add that life to the term: and if the lessee should neglect to nominate the life or pay the fine within the term aforesaid, then he should not be entitled to have a life inserted in the place of the life so dying. There were similar covenants to renew on the fall of the two other lives; the fine upon the fall of the second life being 150*l.*, and that on the fall of the third life 300*l.*

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By indenture of the 9th of March, 1787, the lands of Molinstown, subject to the lease of the 17th of March, 1770, and also the lands of Belfield, were conveyed to *William Rochfort*, in fee.

The Master then set forth the settlement of the 13th of May, 1788, and reported that it contained a power authorising *William Rochfort* to lease the lands for the term of thirty-one years, in possession: that two of the lives in the lease of 1770 died prior to 1792: that by indenture of the 16th of June, 1796, *William Rochfort* granted to *Joseph Moughton* (then entitled to the interest of the lessee) a renewal of the lease of 1770, for the surviving life and two

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other lives: and by deed poll of equal date, released *Haughton* from the observance of the penal covenant in the lease of 1770, *Haughton* covenanting to pay the rent of 240*l.* instead of 223*l.* 6*s.* 2*d.*

He further reported that, at the time of the settlement of 1801, there existed, of the lands of Mollinstown, the lease of 1770, in which one life only was then in being, renewed under the circumstances aforesaid: and that the rent of 240*l.*, with the fee-farm rent of 50*l.*, payable out of the field, was received by *Elizabeth Brown* until the 1st of November, 1834: that the surviving life in the lease of 1770 having died in 1808, a notice to quit was, in September, 1833, served upon *Edward Haughton*, who was entitled to the lands, by *John Sperling*, the surviving tenant of the term for ninety-nine years created by the settlement of 1788, at the instance of *Elizabeth Brown* and her husband: that an ejectment on the title was thereupon brought, and a verdict was given for the defendant, subject to be saved for the lessors of the plaintiff, viz.: that the lease of 1796 was made in violation of the settlement of 1788, was contrary to the stipulations of the lease of 1770, after the periods within which alone the lives could be nominated had expired; and also because the renewal of 1796 was not made by persons who, under the settlement of 1788, were the proper persons to make it; and that, independently of the lease of 1770, the deed of 1796 was a lease agreeable to the powers under the settlement of 1788. The points saved were ruled in favour of the plaintiff; and judgment was entered for the plaintiff in Trinity Term, 1835. No *habere* was executed; on the 20th of June, 1835, *Elizabeth Brown* and her husband obtained possession of the lands by the service of a writ of possession.

undertenants of *Haughton* attorning and becoming their tenants.

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The Master further reported, that upon the reference, the counsel for *Elizabeth Brown* required him to receive evidence, that at the time of the execution of the settlement of 1801, she was ignorant of the execution of the renewal of 1796, and of the effect of the same upon her rights under the settlement of 1788; which the Master refused to do, as same was not within the terms of the reference.

Upon the report being brought under the consideration of the Lord Chancellor, he directed the cause to be reheard upon the construction of the settlement of 1801. The question was, accordingly, argued on the 29th of January, 1846, by Mr. *Moore* and Mr. *Monahan* for the plaintiff, and Mr. Serjeant *Warren* and Mr. *Brooke* for Mrs. *Brown*: and on the 13th of February, judgment was given by

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Jan. 29.
Feb. 13.

THE LORD CHANCELLOR:—

The facts stated in the Master's report led me to re-consider the case, and that induced me to desire it to be re-argued: on both sides the case was well argued. I have since read all the papers, and the result is, that I think that, upon the former hearing, I formed an erroneous opinion. The settlement is an ambiguous one, and I have found it difficult to put a construction upon it which is not open to objection. Mrs. *Rochford*, at the time of her second marriage, was entitled to an estate for life in one

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estate, and to the annuity in question, of 480*l.* per annum, issuing out of another estate. The annuity was secured in the usual way, by powers of distress and entry, and by term of ninety-nine years, in trustees. Both of those estates, subject to portions for younger children, were settled on the first and other sons of the first marriage. She was also entitled to a life annuity of 138*l.* 10*s.* out of other lands. She was her first husband's executrix, and, by payment of his debts, had become entitled to the whole of his small personal estate. She had one son, who was five years old on her second marriage. These facts are all stated in the settlement of 1801; and it is also recited that the clear annual rents of the lands charged with the 480*l.* annuity, did not, upon an average, exceed the sum of 240*l.*, and were, therefore, insufficient to answer the accruing payments of the first annuity. Thus, in effect, the son was without any provision.

The grounds upon which I think the accruing rents must be applied to the arrears accrued since the second marriage, are the following: First, The second settlement was voluntarily made by the widow; it contains no recital from which an intention to benefit the son can be collected; and therefore he can only take what is provided for him. Secondly, No absolute provision was intended for him; for if the second marriage had not been solemnized, he would have been left wholly dependent on his mother. Thirdly, As it was known that upon the determination of the existing lease, which it appears, by the Master's report, depended on one life, the rents would exceed the 480*l.* per annum, and this event might have happened some years before the son obtained his majority, it is not likely that the mother, looking at the terms of the settlement, intended him to take the

surplus rents as against her, whilst the arrears remained unsatisfied. There is no trust for that purpose expressed; upon which omission I place much reliance. I think that no such trust ought to be implied, because the widow meant to make no provision for her son until he attained twenty-one. Fourthly, If the son attained twenty-one, the annuity of 480*l.*, and the annuity of 138*l.* 10*s.* were, during the joint lives of the mother and son, to be a fund for providing him with 100*l.* a year, which was to cease wholly or partially if he became entitled to other property of a like or less amount. Now, if he were to take the surplus rents before the arrears were satisfied, he would, in fact, become entitled to a portion of the very annuity of 480*l.*, out of which his annuity of 100*l.* was to issue, and the latter would cease; but this was not, I think, within the contemplation of the parties. Fifthly, I think that the widow intended only, as between herself, her second husband, and her son, to provide the 100*l.* a year for him; and not further to diminish her rights as far as the accruing rents, during her life, would answer her annuity. But she did not mean to burden his inheritance as against him, by mortgaging or selling under the ninety-nine years' term, for the purpose of raising the arrears. These considerations bring me to the actual provisions of the settlement, upon which the difficulty arises.

The trust of the annuity of 480*l.* for the intended husband and wife, to receive as much as the clear yearly rents of the estate shall, from time to time, be sufficient to pay, clearly shows that only the annual rents are to be resorted to for the annuity; but whether it prevents surplus rents from being applied to arrears is to be collected, not from the doubtful expressions of this trust, but from the whole

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of the instrument. The next clause directs the trustees to stand possessed of "the arrears now due of the said annuity, and also of the arrears which shall hereafter accrue in consequence of the rents being insufficient to answer the same," in trust, if the son attained twenty-one, or married, or survived his mother, then after her death, and his attaining twenty-one or marriage, to release the estate "from the said arrears due, or hereafter to become due, as hereinbefore is mentioned." And if the son should either die in his mother's life-time, or under twenty-one, without having been married, then the arrears then due, and thereafter to become due, as before mentioned, of the said annuity, to be subject to the mother's appointment by deed or will. In default of appointment the trustees were to enforce payment of the arrears, and invest them, and pay the interest to her for life, then to the husband for life, and then to the children of the marriage. This clause, it is admitted, leaves the arrears due at the time of the settlement as a sum not to be raised out of the surplus profits; and that, I think, was the intention. But this admission renders it difficult to consider the subsequent arrears as subject to a different condition. This is to be effected by construing the words "in consequence of the rents being insufficient to answer the same," as confined to the future arrears; and that, upon the whole, is, I think, the right construction. Does this clause, then, mean that every arrear shall remain such until the period arrives for its being released or enforced; or does it act only on such arrear as, at the period referred to (as the event may happen), the rents up to that time shall have been insufficient to answer? The latter, it appears to me, is the right view, having regard to the considerations which I have already mentioned. The arrears were not to be released until after the mother's

death. The son, if the event provided for should happen, will come into possession of his estate unincumbered with arrears; and, in the meantime, the 100*l.* a year provided for him by his mother will be payable. If he should die in his mother's life-time, the arrears then due will be at once raisable. The mother did not, I think, intend to reduce her beneficial interest in the annuity, as far as the rents during her life would answer it; and to permit an arrear to accumulate. The last clause is, that until, under the trusts, the arrears shall either become absolutely vested in the son or become absolutely subject to the appointment of the mother, the trustees shall forbear from requiring or enforcing the payment thereof. These latter words, I think, refer to requiring or enforcing payment by a sale or mortgage under the ninety-nine years' term; and the clause only operates upon the arrears which were, in either of the events provided for, to be raised in that way. Upon the whole, my opinion upon this inaccurate trust now is, that the mother is entitled to have the surplus rents applied, during the joint lives of herself and her son, in satisfaction of the arrears accrued subsequently to the settlement on the second marriage. I cannot represent the question as one upon which I feel no doubt; but after an anxious consideration of it, in all its bearings, I think my former opinion cannot be supported.

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In re CONNOR, late a Lunatic.

May 26.

Bequest of a sum of money to a trustee, in trust to pay to *A. N.* the interest, during her life, or until she married, for the support of her children, *W.* and *R.*; and in case of her death or marriage, to apply it to the use of her children; and on their coming to the age of twenty-one, to divide the said sum between them.

The children of *A. N.* born after the date of the will and in the life-time of the testator, do not take under this bequest.

Semle : A bequest to future illegitimate children is void: and there is no distinction between illegitimate children described as the children of a particular mother, without reference to their paternity, and those who are described as the children of a particular father.

HENRY CONNOR, by his will dated the 10th of June, 1790, executed while he was of sound mind, bequeathed the sum of 650*l.* to a trustee; and desired "that he pay to *Anne Noonan* 39*l.*, the annual interest of said sum, yearly, during her natural life or until she marries for the support of her children, *William* and *Richard*; and in case of her death or marriage, to apply it to the use of her children; and on their coming to the age of twenty-one, to divide the said sum of 650*l.* between them."

At the time of the publication of this will, the testator cohabited with *Anne Noonan*, and had by her two illegitimate children, *William* and *Richard*, named in his will and no other child. He subsequently had by her four other illegitimate children. He died on the 7th of May, 1838, having survived *Anne Noonan* and her two children, *William* and *Richard*; but leaving the other four children him surviving.

Pursuant to an order of reference to inquire and report the rights of the parties to the funds to the credit of the matter, the Master reported that the surviving children of *Anne Noonan* were resident in New South Wales; and that, upon the true construction of the will, they were not entitled to any part of the sum of 650*l.*: but suggested that the 650*l.* should be impounded until a communication on the subject could be had with them.

The money was accordingly impounded, and invested

ck; and now a petition was presented by the children of *re Noonan*, praying that the stock might be transferred to them: at the same time, the personal representative of *ry Connor* moved that the stock might be transferred to her; or that the rights of the next of kin of *Henry Connor* and of the children of *Anne Noonan* to the same, might be ascertained.

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r. Sergeant Warren and *Mr. Hunt*, for the personal representative, submitted that, according to the true construction of the will, the only children of *Anne Noonan* entitled to be provided for were *William* and *Richard*; that a bequest to unborn illegitimate children of a particular woman was invalid: *Metham v. Duke of Devon(a)*; *Id v. Preston(b)*; *Wilkinson v. Adam(c)*; *Harris v. d(d)*; *Bagley v. Mollard(e)*; *Mortimer v. West(f)*; *er v. Alexander(g)*.

Argument.

r. Pigot and *Mr. Deasy* for the children of *Anne an*.

This was the case of a bequest to legitimate children, after-born children would take under it: *Matchwick v. (h)*; *Freemantle v. Taylor(i)*: and from the will itself, it is clear that such after-born children must be illegitimate. It has never been decided that a bequest to after-born illegitimate children of a particular woman is invalid. Lord Brougham, in *Wilkinson v. Adam*, seems to think that such a bequest would be good. *Mortimer v. West* merely decided the word "children" in a will means legitimate chil-

¹ P. W. 529.

¹⁸ Ves. 288.

¹ V. & B. 422.

¹ Tur. & Rus. 310.

¹ R. & M. 581.

(*f*) 3 Rus. 370.

(*g*) 2 Ha. 275.

(*h*) 3 Ves. 609.

(*i*) 15 Ves. 363.

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dren. In *Earle v. Wilson(a)*, and the other cases cited, a bequest was held to be void, because the paternity of child formed part of the description of the legatee; but in *Gordon v. Gordon(b)* a bequest to the natural child of which a woman was *enciente*, without reference to any person as the father, was upheld. *Fraser v. Pigott(c)* was referred to.

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THE LORD CHANCELLOR :—

This is a question of construction, which may or may not involve a very important question of law. The testator gives 650*l.* to a trustee, “to pay to *Anne Noonan* 39*l.*, the annual interest of said sum, yearly, during her natural life, or until she marries, for the support of her children, *William* and *Richard*.” It is clear from this, that the testator meant no children of this woman to be supported out of this fund, during the life-time or until the marriage of the mother, except *William* and *Richard*. They are the only ones he meant to provide for. He then goes on thus: “And in case of her death or marriage, to apply it to the use of her children;”—the very term he used before when he coupled it with the names of the children;—“and on their coming to the age of twenty-one, to divide the said sum of 650*l.* between them.” I cannot imagine a fair doubt on the construction of this will. He was looking to those two children only; for, during the life of *Anne Noonan*, he has provided for them alone; so that, even should she have illegitimate children, they could not, under the will and without reference to any legal question, take any interest in this fund during their mother’s life-time. Is there

(a) 17 Ves. 528.

(c) *Younge*, 354.

(b) 1 Mer. 141.

any probability that the testator meant to provide the interest of this fund for one class of children, during this woman's life-time, and, on her decease or marriage, to give the capital to another class of children? He meant to provide for the two children only; and on the expiration of the life or the happening of the particular event, they were to take the capital between them. Upon that view of the case I have no difficulty. Children by marriage it could not mean: for the right of the children to the present enjoyment of the fund was to depend on the happening of the very event from which legitimate children were to spring. Therefore, the children of the marriage could not be the object of his bounty. In my view of the case, the question of law does not arise; namely, whether a person can provide for unborn illegitimate children, where the father is not referred to. I should not decide that question without looking into the authorities; but I confess that my impression is, that, upon the current of the authorities, it makes no difference in a gift to unborn illegitimate children, whether the father is referred to or not. I find that, in arguing the case of *Mortimer v. West*(a), I stated the law thus: "*Meetham v. The Duke of Devon* establishes the proposition, that a bequest to future illegitimate children is void; and there is no authority for making a distinction between illegitimate children described as being the children of a particular mother, and those who are described as the children of a particular father." I have no doubt that at that time, I believed what I stated, after considerable research, to be law; and that is still my impression of the result of the authorities. It is on the ground of public policy that such gifts are held to be void; not because of the difficulty

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(a) 3 Russ. 370.

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or indelicacy which might ensue in pursuing an inquiry to the paternity of an illegitimate child. In order to provide for children of that class, they must first acquire a name by reputation. A child *in ventre sa mere* is a child *in esse*, and may have a name by reputation. I do not, however, mean to decide that question, which is not before me: for I hold, upon the construction of this will, that the only children provided for are those named; and that no subsequently born illegitimate children can take. I must, therefore, refuse the prayer of the petition; but as this was a proper question to be raised, the costs must come out of the fund.

DYAS v. CRUISE.

June 9, 10, 14.

An estate was limited to *L.* for life, with power to lease at the best rent. *L.* demised the lands to a trustee for a term

of years, to

secure an annuity to *G.*, and covenanted to exercise his power of leasing: and afterwards was discharged as an insolvent. *L.* and *G.* agreed to demise the lands, and accordingly executed the lease:—*Held*, that the Provisional Assignee was bound to execute the lease, as he took the estate subject to all the equities and liabilities to which it was subject in the hands of the insolvent; and the exercise of the power was for benefit of the creditors.

An agent to let lands is bound to let them to the best advantage: but, upon the mere ground of undervalue, a *bond fide* letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if that agent has acted fairly and honestly.

Under a power to lease at the best rent, the highest rent need not be reserved. The question—What is the test that the best rent has been reserved? and the cases on the subject considered.

An authority to let lands may be inferred from the letters and acts of the party.

Tenant for life, with power to lease at the best rent, agrees to make a demise for a term warranted by the power, but at a rent which afterwards appears not to be the best rent. There being no fraud in the transaction, the Court will decree a partial performance of the agreement, and direct the tenant for life to execute the agreement as far as his estate enable him to do so.

Hartnett v. Yielding (2 Sch. & Lef. 549) observed upon.

of Darvistown and Paristown, in the county of Westmeath, containing about 246 acres ; with a power to demise the same for the term of thirty-one years or three lives, but not for thirty-one years or three lives whichever should last longest, in possession, but not in reversion, and at the best rent. The lands were at that time held by *John Hopkins*, under a lease for a term of sixty-one years, which would expire on the 1st of May, 1843, at the rent of 209*l.*, late currency, per annum.

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By indenture of lease and release of the 6th of November, 1837, between *William J. Lynch* and *Emily*, his wife (who was entitled to a jointure out of her husband's moiety of the lands), of the first part ; *William Galway* of the second part ; trustees of the third and fourth parts ; and *John Galway* of the fifth part : after reciting the lease to *Hopkins*, and that *William Galway* was entitled to three several annuities, amounting together to 96*l.* 10*s.*, charged upon *Lynch's* moiety of the lands, two of which were secured by terms for years in the lands, vested in trustees who were parties to the indenture ; and further reciting that the lands were likely to increase in the yearly income thereof by a new letting at the expiration of *Hopkins'* lease ; *William J. Lynch* and *Emily*, his wife, in consideration of the premises, and of the sum of 270*l.* to them paid by *William Galway*, and the trustees of the terms for years, granted and conveyed, according to their several estates and interests, to *John Galway*, *Lynch's* moiety of the lands, and the rents and profits thereof, as well those then payable thereout as any future rent to become payable on the expiration of *Hopkins'* lease and a new letting of the lands ; to hold for the residue of the said terms for years, provided *William J. Lynch* and *Emily*, his wife, should

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so long live; upon trust, in the first instance, to pay three existing annuities to *William Galway*; and in next place to pay to him the further annuity of 30*l* during the life of *William J. Lynch*; and to hand over surplus to *W. J. Lynch* and *Emily*, his wife, and their signs: with a proviso for the redemption of the annuity therein mentioned. And it was agreed that it should be lawful for *William J. Lynch*, at the expiration of *Hopkins'* lease and he thereby covenanted to set and lease the lands on such term and at such rent as he was allowed to do under the will of *P. Maguire*: but that such new leases and rents thereby reserved should be subject to and enure, be paid to *John Galway*, his executors, &c., for the purpose of securing and paying the aforesaid annuities; and that the residue thereof should be paid to *W. J. Lynch* and *Emily* his wife, or the person then legally entitled thereto.

In 1829 *Patrick R. Cruise* emigrated to the United States of America; but previous to his departure, he, by power of attorney, appointed *John Smyth*, a solicitor, to be his agent to receive his proportion of the rents of the said lands, also of a house in the city of Dublin, and to remit the same to him; and to act on his behalf in respect of the same as occasion should require. Under this authority, *John Smyth* acted as receiver over one moiety of the lands, in conjunction with *William Galway*, who managed and received the rents of the other moiety on his own behalf and on that of *William J. Lynch*.

In August, 1842, *William Galway* and *John Smyth* caused a notice to be served upon the tenants in possession of the lands of Darvistown and Paristown, informing that the lease granted to the late *John Hopkins* would

pire on the 1st of May then next; on and after which day the same would be let to the highest bidders: and all persons desiring to become or to continue tenants of the lands were thereby invited to send in their proposals, in writing, without delay, either to *William Galway* or to *John Smyth*, agents for the respective properties; and it was therein stated that the agents would attend to view the lands early in the month of September then next.

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In February, 1843, *John Smyth* wrote a letter to *Patrick Russell Cruise*, then resident in New York, from which the following passages are extracted. "I send you a Bank bill for 35*l.*, and regret that I could not remit it sooner, but the fact is, rents become more difficult of collection every day in Ireland. Your estate in Westmeath, which I visited in October last, presents a wretched and worn-out appearance, as compared with the surrounding properties; but I could expect nothing better at the expiration of a sixty years' lease, farmed out and rack-rented as the lands were by the *Hopkins'* family. What with the low price of agricultural produce, the very depressed state of trade, the tariff, and the exhausted condition of the lands, I very much fear that an average acreable rent of 1*l.* 5*s.* or 1*l.* 6*s.* will not be got for them, and that will not add much to your income. I will endeavour, notwithstanding, with the aid and co-operation of *William Lynch*, and his assignee, *Galway*, who have appointed to accompany me to the lands during the first week in March, to set them to the best advantage: but it is necessary for me to have full power and authority to act in your behalf; and if you have sufficient confidence in my zeal and integrity, you will please to write me a letter authorizing me, in the first place, to demand and recover possession of the lands of Darvistown and Paristown, as

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held by the representatives of *John Hopkins*, and, when recovered, to set, or join in the setting of them, to one or more tenants, according as I may judge best for your interests. I should send you a formal letter of attorney to that effect, but I do not choose to anticipate your wishes. Let your communication be as technical as may be, that I may exhibit it to your co-proprietors. The lands, with the exception of a small division, have been worked to death; and it will require the expenditure of much capital and labour to make them reproductive. We have had an offer of 1*l.* 12*s.* 6*d.* for one wing of it; but then the other extremity is not worth more than 1*l.* I fear we will not get quiet possession; for there is a very lawless family settled in Paristown, and they must be got rid of by process of ejectment; nor do I think the next gale of rent will be paid at the stipulated period of four months after it becomes due." *Patrick R. Cruise* replied by letter, dated the 29th of March, 1843, which contained these passages: "I have received your favour of February 19th, last week, enclosing a draft for 35*l.* sterling. . . The power of attorney I shall send you, to follow this as soon as I can get it drawn."

Upon the 1st of May, 1843, when *Hopkins'* lease expired, *William J. Lynch*, *William Galway*, and *John Smyth*, went to the lands, and took formal possession of Darvistown, the occupying tenants being reinstated in their respective holdings as caretakers; but the occupying tenants of Paristown refused to deliver up possession, and were subsequently evicted by process of ejectment. In the same month a notice was posted and circulated throughout the county, stating that the lands would be let on lease for three lives or for thirty-one years, if preferred, from the 1st day of May then instant; and that proposals in writing would

be received by *William J. Lynch, John Smyth, or William Gahway*; and that the tenant or tenants would be declared on the 1st of June. It further stated, that the outgoing tenants of part of the lands, over which they had been placed as caretakers, would be entitled to a portion of the growing crop, according to the *modus* of the country: and that the new tenant would have the benefit of the *modus*. Upon the 31st of May, 1843, the plaintiff, *Richard Dyas*, a gentleman of property resident in the neighbourhood, sent in a written proposal for the lands of Darvistown, proposing to take a lease of them for the term of thirty-one years, at the yearly rent of 228*l.* 16*s.*, to which to be added the tithe rent-charge, in the shape of reserved rent: the lease to contain, in addition to the usual reservation of timber and timber trees, quarries of stone and marble, and all the royalties, the usual covenants as between landlord and tenant, and a non-alienation clause; rent to commence from the 1st day of May, 1843, and to be payable half-yearly; in the event of any difference of opinion taking place between him and the outgoing tenants, same to be settled by the custom of the country: and further, that he would expect a letter stating that he was not required to dispossess the present tenants until it was his convenience to do so. The rent-charge amounted to 4*l.* 9*s.* per annum; which, added to the rent, would make the entire reserved rent to be 233*l.* 5*s.*

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The occupying tenants of Darvistown, who were four in number (one of whom, *Patrick Conlan*, had only shortly before got into possession by paying a sum of 10*l.* to the then occupying tenant), likewise sent in proposals for new leases of their respective holdings. *Patrick Conlan* proposed to give, for fifty-two acres, the acreable rent of 11*l.* 5*s.*

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for the term of three years, from the 1st of May, 1843; and for such further time as the lessors might think desirable to give of the lands, the rent of 1*l.* 12*s.* 6*d.* per Irish acre, and he proposed to build a stone and mortar dwelling-house on the lands, and to slate the same. *William Wheeler* proposed to pay 1*l.* 5*s.* per Irish acre, for fifty-six acres, three years; afterwards, to pay 1*l.* 10*s.* per acre for the mainder of the lease. *Patrick Smith* proposed to pay, seventeen acres, two roods, and three perches, the yearly rent of 18*l.* 9*s.* 2*d.* during three lives or thirty-one years, and having stated that the land was exhausted, and required both attention and expense to make improvement in sowing grass seeds and clover, he referred to the lessors' consideration such rents as they would think just to fix upon three first years of the term, to enable him(a). *Peter Donaghlan* proposed to pay 18*s.* 6*d.* per Irish acre for that part of the lands of Darvistown then in his possession, during the natural life or lives of Darvistown(a), for the first three years; and 1*l.* 1*s.* per acre afterwards.

It was in evidence that it was in consequence of the suggestion of Mr. *Galway* to that effect, that the undertenants proposed to give a reduced rent for the first three years of the term.

Upon the 1st of June, 1843, *Richard Dyas* went to the office of *John Smyth*, where he met *William J. Lynch* and *William Galway*, who informed him that they had agreed to accept his proposal, and to execute to him a lease of the lands. No written acceptance of his proposal was signed by them; but *John Smyth*, in the presence and with

(a) *Sic.*

concurrence of *W. J. Lynch* and *W. Galway*, wrote and signed a letter or order in these terms: " We have agreed to demise the lands of Darvistown to *Richard Dyas*, Esq.; you will therefore permit him to use and occupy the lands, or otherwise manage them as he may be advised. 1st June, 1843. To *William Wheeler*, *Peter Monaghan*, and *Patrick Smyth*, our caretakers. (Signed), *John Smyth*. *Robert Charters*. Put Mr. *Dyas* into the possession of the above lands. To *Robert Charters*. (Signed), *John Smyth*." *Robert Charters* was the bailiff employed by *Lynch*, *Galway*, and *Smyth*.

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Immediately after his proposal was accepted, Mr. *Dyas* agreed to allow *Peter Monaghan* and *Patrick Smyth* to take away the entire of their crops; and he let to *William Wheeler* a portion of the lands, different from that which he was then in possession of, containing forty-three acres, at the rent of 11. 12s. 6d. the acre: and on the 10th of June, 1843, Mr. *Dyas* was formally put in possession of the lands by *Charters*.

The following are extracts from the subsequent correspondence between the parties.—1st July, 1843, *John Smyth* to *P. R. Cruise*: " The lease of Darvistown and Paristown expired, you are aware, on the 1st of May last; but the undertenants of Paristown refused to give *Lynch* and me possession, in consequence of which I was obliged to bring an ejectment, and I intend executing the *habere* next week. We have agreed to let Darvistown, containing 176 acres, plantation measure, to a neighbouring gentleman, Mr. *Richard Dyas*, for thirty-one years, at the yearly rent of 228*l.* 16*s.*, being at the rate of 1*l.* 6*s.* per acre, to commence on and from the 1st of May last. He undertakes not to disturb an old tenant

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on the lands, named *Wheeler* ; and from the state of feeling in the country, we apprehend we shall find it necessary to treat with some of the occupying tenants of *Paristown*, notwithstanding their passive resistance to us : for no other person will venture to enter upon the lands if they be forcibly removed. *Paristown* is in a most exhausted state, and we do not expect to obtain any very considerable advance on the past rent ; but, on the whole, your income will be increased about 60*l.* a year more or less."

2nd August, 1843, *P. R. Cruise* to *J. Smyth* : " I am in possession of your esteemed favour of July 1st, enclosing a draft for 33*l.* sterling. . . I expected a greater advance on the *Darvistown* lands ; however, no doubt you have acted with the best judgment in the matter, and with due concern to my interests. It is some comfort to find I have got an advance. . . *P. S.*—I presume you got along without the power of attorney ; if you wish it still, you must send me the form of it, with the necessary instructions ; they charge so much for these matters here."

Shortly after *Mr. Dyas* had been put into possession of the lands, statements were circulated throughout the country and published in the newspapers, animadverting upon the conduct of *Mr. Smyth* in letting the lands to *Mr. Dyas* in preference to the occupying tenants. The matter was taken up by some of the Roman Catholic clergymen of the neighbourhood ; and a formal complaint was made against *Smyth* before the Repeal Association, of which he was a member, charging him with having, without sufficient cause, taken the lands from the Roman Catholic tenantry and given them to Protestants : and a committee having been appointed by the Association to investigate the charges, they made

a report ; in consequence of which great clamour was raised against Mr. *Smyth*, and he ceased to be a member of the Association. The whole proceedings were published in the newspapers ; and were communicated to Mr. *Cruise*, at New York.

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In September, 1843, Mr. *Smyth* transmitted to Mr. *Cruise* the newspapers containing the charges against him, and the proceedings thereon ; and at the same time he wrote him a letter, stating his determination to resign his agency in consequence of the popular odium directed against him ; and required Mr. *Cruise* to nominate some other person in his place, and suggested the propriety of appointing Mr. *Lynch* or Mr. *Galway*. In reply to this, Mr. *Cruise* wrote to Mr. *Smyth*, on the 14th November, 1843 : “ I have your kind favour of 30th September, enclosing me a power of attorney to execute to some person in your place. I would rather it had been a letter of money to relieve the pressing wants of my family. I should rather decline executing the paper until I become acquainted with the parties. I regret the trouble you have had on my account, but I beg you will continue to act as far as you consistently can, until I go over, which shall be as soon as I can conveniently get off.” On the 1st of December, 1843, Mr. *Smyth* wrote to Mr. *Cruise*, refusing to continue as agent over the property ; and in reply received a letter of the 28th of December, 1843 : “ I wish you and your’s the compliments of the season ; a gloomy one, I assure you, it is to us, without funds, or anything to represent them. You may suppose our situation. I did positively calculate on Mr. *Dyas’s* rent by the steamer that left Liverpool on the 5th instant ; but, as usual, nothing but disappointment. Mr. *Dyas’s* rent, I presume, was payable on the 1st of November last, half-a-

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year, unless you have given him the old custom of retaining it for six months. I should have been in Ireland long before this, but could not bring myself to leave my family in a state of destitution. I was made aware, through the Dublin Journals, with your difficulties with the Arbitration Committee^(a) and Mr. O'C., in relation to the lands of Darvistown and Paristown. . . I am satisfied I can make some better arrangement for myself when I go over, than executing the power of attorney to *Galway* or *Lynch*. . The power you sent me to execute is a strong one; and it is not without serious reflection, and a proper knowledge of the individual, that I would be inclined to perfect it; however, I should rather prefer you yourself continuing to act. I have no hesitation in executing it to you."

In consequence of this letter, Mr. *Smyth* applied to Mr. *Dyas* to remit to Mr. *Cruise* his November rent; and Mr. *Dyas* having sent it to Mr. *Smyth*, he, on the 9th of February, 1844, remitted it to Mr. *Cruise*, in a letter, stating that his doing so was not to commit him to a reassumption of the agency.

The following correspondence afterwards took place between the parties.—26th February, 1844, Mr. *Cruise* to Mr. *Smyth*: "Sir,—Notwithstanding that you have yielded up the management of my affairs, I have drawn upon you for 5*l.* sterling, in favour of Mr. *J. D.*, a small donation which I have given towards the erection of a new church in the town of Longford. I shall depend upon your punctuality in the payment of it. There are funds enough now in the hands of Mr. *Dyas*, who, no doubt, will honour my draft on your

(a) The Committee appointed by the Repeal Association.

my handwriting." 22nd March, 1844 ; Mr. *Cruise*
Smyth : " I have your favour of the 9th of Fe-
 , covering a draft for 40*l.* 17*s.* 6*d.* sterling, for
 I feel truly thankful, as we could not have been
 in need of it. I received a letter from Mr. *Gal-*
lated January the 4th last, but have been unable to
 do it until now. I should willingly have sent out the
 of attorney some time ago, but was still expecting to
 Ireland myself ; and the perfection of the instrument
 would have cost me more money than I had to give

I shall write to Mr. *Galway* by the packet that
 this. I wish here to disabuse you of the idea you have,
 have been carrying on a secret correspondence with
 enemies, or doing any other act disparaging towards
 a whom I have always had the fullest confidence. In
 quence of an anonymous communication I received, in
 in to what instructions I had given with regard to the
 ; of the Westmeath property, I did write one letter,
 only one, to the Rev. Mr. *Rickard*, P. P. of Athboy, he
 located in the immediate neighbourhood, for whatever
 relation he could give me on the subject. The letter
 contains nothing in the slightest degree that could be offen-
 sive to any one. I should have written to you on the same
 subject ; but, knowing you to be generally full of business,
 communication might not be as full as I could wish in
 . I should, indeed, *Smyth*, feel that I was ungrate-
 ful should I lend myself to speak of you but in the highest
 terms. You need not be surprised if you should see me
 as soon as the arrival of this letter." 22nd March,
 ; Mr. *Cruise* to Mr. *Galway* : " I would have sent
 out a power of attorney some time since, agreeable to
Smyth's advice, but I have been expecting to go over
 myself, and I shall likely be there as soon as this letter ; be-
 , the perfection of that instrument would have cost me

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more than the past state of my finances would enable me to give ; in the mean time use your own discretion with regard to the lands of Paristown. I have no doubt but you will act with due regard to our mutual interests. I shall be satisfied at the result, as also that you collect my income in Ireland out of Darvistown and Paristown, and the house in Church-street, in the city of Dublin." 30th of May, 1844 : Mr. Cruise to Mr. Galway : " My departure for Dublin being delayed, I write to beg you will have the kindness to collect whatever rent there may be now due to me out of the lands of Darvistown and Paristown, and the house in Church-street, and forward them as soon as possible." Accompanying this letter was a power of attorney, executed by P. R. Cruise, appointing Galway his agent to receive his rents.

Pending this correspondence, Mr. Dyas caused a draught lease to be prepared ; which having been approved of by Lynch, Galway, and Smyth on behalf of Mr. Cruise, was engrossed, and sent to Liverpool, to be from thence sent to Mr. Cruise for execution : but before it was sent to America, Mr. Cruise, upon the 27th of June, 1844, arrived in Ireland ; and on the 29th of June, Mr. Galway had an interview with him, at his request ; upon which occasion he informed Mr. Cruise of all the circumstances connected with the letting to Mr. Dyas. Mr. Cruise expressed himself to be perfectly satisfied with Mr. Smyth's conduct, and stated that he had the greatest reliance and dependence upon him ; and said that he would execute the leases. The leases were accordingly transmitted from Liverpool to Dublin ; and Mr. Galway wrote to Mr. Dyas to come to Dublin to execute them. But in the mean time Mr. Cruise went to the lands ; and having been induced to believe that Mr. Smyth had neglected his interests, and had let the lands at

undervalue, he, when applied to by Mr. *Galway* to execute the lease, replied by a letter of the 10th of July, 1844, declining to do so, stating that the lands had been let to Mr. *Dyas* at an undervalue. A correspondence thereupon took place between the parties, in which Mr. *Cruise* still persisted in his refusal to execute the lease. Mr. *Dyas* frequently applied to him to accept the rent which became due in May; which Mr. *Cruise* refused: notwithstanding which, upon the 21st of September, 1844, Mr. *Cruise* wrote to Mr. *Dyas* for payment of the rent, threatening to resort to the lands for it if not paid, but stating that he did so without prejudice to any proceedings he might take to recover possession; in reply to which Mr. *Dyas*, upon the 25th of the same month, wrote, stating that the amount of his rent had, for a long time, been lodged in the hands of his solicitor, who had frequently called upon him at his hotel to pay it, but was unable to see him; and that he was ready to pay it at any time appointed; and insisted upon the perfection of his case, and threatened, in case of refusal, to have recourse to proceedings to enforce it. Upon the 28th of September, 1844, Mr. *Cruise* received the rent; at the same time the lease was tendered to him for execution, and he refused to execute it; whereupon a notice, dated the 19th of July, 1844, was served upon him (a copy of which had previously been served upon *William J. Lynch*), requiring him to execute the lease. The reply to this was a notice to quit, served by Mr. *Cruise*. The leases were afterwards executed by Mr. *Lynch* and Mr. *Galway*, who, upon the decease of *John Galway*, the trustee in the deed of 1837, became entitled to the legal estate in the term. Previously, however, in March, 1841, *William J. Lynch* had been discharged as an insolvent; and his real and personal estate and effects were vested in *James Scott Molloy*, the Provisional Assignee.

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The bill was filed by Mr. *Dyas* against *P. R. Cruise* and *J. S. Molloy*: it stated, that *W. J. Lynch* and *P. R. Cruise* were seised of or entitled unto in fee simple, or for some other good and sufficient estate of freehold, in undivided moieties as tenants in common, of the lands of Darvistown and Paristown, which were held under *W. J. Lynch* and *P. R. Cruise*, by one *John Hopkins*, by virtue of a lease made to him thereof by *Patrick Maguire*, the grandfather of *W. J. Lynch* and *P. R. Cruise*, dated the 6th of November, 1782, for the term of sixty-one years from the 1st of May, 1782, at the yearly rent of 209*l.*, late currency; which lease and term were to expire upon the 1st of May, 1843: and that *W. J. Lynch*, being so seised or entitled, by indenture of lease and release, dated the 6th of November, 1837, &c. (setting forth the foregoing matters): and charged, in answer to a pretence to the contrary, that if *P. R. Cruise* and *W. J. Lynch* were but tenants for life under the will of *P. Maguire*, that circumstance would not prevent them from being capable of making such lease as aforesaid to the plaintiff; which would, at all events, be binding during their lives, and might wholly take effect during that period; besides which, the said will, if it did constitute the said parties tenants for life, gave to them such power of leasing as would fully warrant a lease in conformity with the plaintiff's proposal. The prayer was for a specific performance of the agreement to grant the lease; and for an injunction against proceedings at law.

Patrick R. Cruise alone answered the bill (the other defendant having allowed a decree *pro confesso* to be taken against him). He denied that he had ever authorized *John Smyth* to demise the lands; and said the plaintiff knew that *Smyth* had no authority to do so. He said that the proposals

of the undertenants had been fraudulently obtained by Mr. *Smyth*, with the knowledge and concurrence of Mr. *Dyas*, for the purpose of obtaining a colourable justification for letting the lands to Mr. *Dyas*, at the rent which he undertook to pay therefor. He alleged that the lands were let at an undervalue ; and said, but did not prove, that a larger rent had been offered for them by other solvent persons. He also relied upon the Statute of Frauds, the contract not being in writing ; and denied that there was any part performance or acquiescence by him, after he became aware of the real state of the case. He said, that *W. J. Lynch*, having been discharged as an insolvent, was but little personally concerned in what rent was had for the land ; and admitted that *W. Galway* and *W. J. Lynch* had executed the leases to the plaintiff agreeably with said agreement. He also admitted that he was verbally indemnified, by the former undertenants, against all costs to be incurred by him in resisting the plaintiff's demand. It was proved that before Mr. *Cruise* saw the lands, in June, 1844, Mr. *Dyas* had expended over 700*l.* in improving them.

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Mr. Sergeant *Warren*, Mr. *Moore*, and Mr. *Christian*,
for the plaintiff.

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Mr. *Monahan*, Mr. *H. G. Hughes*, Mr. *D. Lynch*, and
Sir *Colman O'Loghlen*, for the defendant.

It was admitted by the counsel for the defendant, that the case was taken out of the operation of the Statute of Frauds, by part performance. *Western v. Russell(a)* ; *Dobell v. Hutchinson(b)*, and *Sullivan v. Jacob(c)*, were referred to.

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THE LORD CHANCELLOR :—

This bill was filed for the specific performance of an agreement to grant a lease for thirty-one years, by Mr. *Dyas*, to whom the lease was to be granted, against Mr. *Cruise*, the tenant for life of an undivided moiety of the estate, which was settled in strict settlement, and against the Provisional Assignee of Mr. *Lynch*, an insolvent, tenant for life of the other moiety. The Provisional Assignee has allowed the bill to be taken *pro confesso* against him.

Mr. *Lynch* and Mr. *Cruise* were tenants in common, for their lives, of this estate, with remainders to their issue respectively, in strict settlement; with power to lease, in possession, at the best rent that could be obtained from a solvent tenant, for the term of thirty-one years. Previously to the agreement in question, the lands were held by a Mr. *Hopkins*, under an old lease, at rather a small rent. Mr. *Cruise* was resident in America; Mr. *Lynch* resides in this country. He had heavily incumbered his property, and had charged his life interest with an annuity to Mr. *Galway*, a solicitor; and had granted the lands to a trustee for *Galway*, for a term of years, dependent, of course, upon his life, upon trust to secure the annuity; and he had covenanted with *Galway* to exercise his power of leasing upon the expiration of *Hopkins'* lease. *Lynch* afterwards became an insolvent, and his Provisional Assignee has been made a party to the suit. Mr. *Cruise* appears to have been in straightened circumstances: the correspondence which has been read, shows that he was always pressing for the rent, I may say, before it was due. In fact, the rent of this property was all he had to depend on; it was therefore of the greatest importance to him that the property should be let, and that not an hour

should be lost in transmitting the rent to him. He had an agent in this country, a solicitor and friend, named *Smyth*. Of course, his only duty, while the lease subsisted, was to receive the rent and transmit it to his principal in America. This he did regularly ; and so matters stood until the period when the old lease was about to expire. It is obvious that, unless all the parties entitled to the property could agree in re-letting the estate to the same tenant, there could be no re-letting at all. Two husbandry tenants could not well manage a farm in common : such an occupation could not possibly be beneficial. Therefore, but two modes of proceeding were open ; either that the parties should agree in the choice of one husbandry tenant, or that a bill for a partition should be filed : and in the circumstances in which Mr. *Cruise* was placed, nothing could have been more unfortunate for him than a bill of partition. Mr. *Smyth* went over the property in the autumn of 1842, to prepare for the re-letting ; and he shortly afterwards wrote to Mr. *Cruise*, detailing its dilapidated condition, and stating that part of the lands had been exhausted, and that it would require much capital to restore them again to a good condition : and his description has been borne out by the evidence of every person examined in the cause. Mr. *Smyth* found the property to be in the possession of four persons, three of whom had been undertenants to Mr. *Hopkins* ; one for a long period of time, the others for shorter periods. The fourth was a person who had taken the grazing of part of the land ; and whatever may be the notions of such persons as to tenant-right, it cannot be pretended that the claim of a man giving 10*l.* for the grass of the land, and thereby getting into possession, just at the expiration of the lease, is entitled to the smallest attention. On the contrary, it is be looked upon with suspicion ; for it has the appear-

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ance of a party getting into possession in order that he may put forward an unfounded claim.

Mr. *Smyth* and Mr. *Galway* prevailed on the undertenants to give up possession of the lands; that is, they gave up a formal possession, but they were immediately again put into possession, although the character of their holding was changed; they became caretakers and not tenants. It is plain that *Smyth* and *Galway* intended to act fairly towards the undertenants; for, when the property was re-let, they stipulated that *Wheeler*, an ancient tenant, should be provided for,—and he has been; and they also stipulated for fair terms for the other two tenants as to their growing crops. The undertenants had not a legal right to a lease; but they had a fair claim, if they acted properly. In the choice of a tenant I should always feel a desire to give a preference to the actual occupier of the soil, as far as it can be done with a due regard to the interests of the persons entitled to the property. In this case the claim of the undertenants is not entitled to much respect; for, not being amenable to the head landlord, they took advantage of their situation, and used the property in a way which would prevent any landlord from accepting them as tenants. I never would, as a Judge, or in my private capacity, accept a person as tenant who had exhausted and wasted the lands. But, though this was the case, I am satisfied that their conduct had no influence on the persons letting the estate.

Now, with regard to the re-letting, there is a circumstance which is entitled to some weight. Though Mr. *Cruise* was absent from the country, and had to depend on his agent, yet there were persons resident in this country,

Lynch and *Mr. Galway*, who were equally interested
 self in seeing that the property was well managed.
 therefore, an advantage from the state of the title,
 could not have enjoyed had he had an undivided
 of the lands. Under these circumstances, a
 notice was circulated, stating that this property
 be let ; and referring persons, desirous of becoming
 to *Mr. Galway*, *Mr. Lynch*, and *Mr. Smyth*. The
 ants were invited to send in proposals ; and they
 e offers, as did also *Mr. Dyas*, a gentleman of
 and skill, who resided in the neighbourhood and
 d his own estate ; and the result was, that *Lynch*,
 and *Galway*, accepted *Mr. Dyas's* offer in prefer-
 those of the undertenants ; and agreed to let the
 him.

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his bill, filed for a specific execution of that agree-
 is objected by *Mr. Cruise*, first, that *Mr. Smyth*
 any authority from him to let the lands, and there-
 he is not now bound to grant the lease : and se-
 hat, if *Smyth* had authority to let the lands, that
 was coupled with two conditions : first, that it
 e by a lease to be made by the owners of both the
 and, consequently, that the plaintiff must now
 t he is entitled to a lease from the persons entitled
 moieties ; and secondly, that the lease should be
 the best rent ; and for that purpose, the power of
 the will, under which both *Cruise* and *Lynch* de-
 referred to.

Lordship then commented on the evidence, and
 the conclusion, that *Mr. Smyth* was authorized by
 ise to let the lands.]

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It was next objected, that if Mr. *Smyth* were authorize to let the lands, his authority depended on the observance of two conditions : the first of which was, that the letting should be with the concurrence of the co-owners of the estate : and it is said, but not argued, that it is impossible to obtain that concurrence ; for, though both *Lynch* and *Galway* have executed the lease to Mr. *Dyas*, yet the Provisional Assignee of Mr. *Lynch* has not been, nor can he be compelled to do so ; and that the order to take the bill *pro confesso* will not enable me to make a decree against him. The case stands thus : the legal estate was in a trustee for *Galway*, for a term of years, dependent on the life of *Lynch* ; and he could make a legal demise commensurate with his estate. *Lynch* had the reversion expectant on the term for years vested in him ; and he was capable of exercising the power of leasing, subject, of course, to the term granted to the trustee for *Galway* : he had covenanted with *Galway* to execute that power upon the expiration of the lease to *Hopkins* ; and he and *Galway*, in whom the legal estate in the term was then vested, joined in executing the lease to *Dyas*. This was not a legal execution of the power ; for the power was vested in the tenant for life, subject to the incumbrance, and the estate for life in respect of which only he could exercise it, had, upon his insolvency, passed to the Provisional Assignee. But the Provisional Assignee took the estate subject to all the equities and liabilities to which it was subject in the hands of the insolvent : therefore, in this case, he was bound, by the previous legal covenant of *Lynch*, to exercise the power. The Insolvent Statutes give authority to assignees to execute powers like these for the benefit of the creditors ; and there is no doubt that it is for their benefit that this power should be exercised ; for if they should become entitled in possession

the estate, they will find a tenant paying a greater rent than could be obtained, if the power were not exercised. Then, there being a binding, *bonâ fide* contract entered into with the tenant for life, can I enforce it against his assignee? There is an order to take this bill *pro confesso* against him; and that amounts to an admission by him of all the facts stated in the bill. He thus admits that he has taken the life estate of the insolvent, bound by this covenant. I shall therefore decree the Provisional Assignee to do all necessary acts to give effect to the lease to Mr. *Dyas*, supposing I should be of opinion that this contract ought to be enforced.

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The next objection is this: it is said that in a letter from Mr. *Smyth* to Mr. *Cruise*, asking for authority to let the lands, he said that he would endeavour, with the aid of *Smyth* and *Galway*, to set them to the best advantage: and as request being acceded to, it was argued that these words were equivalent to similar words in a power of attorney, and gave a conditional authority only to Mr. *Smyth*. Even without such words, I think an agent is bound to let the lands of his principal to the best advantage; and though I do not agree that the rent is to be weighed in the same scales whether a man is acting as owner or as agent, yet I agree that, if this be not a contract for a lease at the best rent, it is not to be enforced. But I do not desire to be understood, that, either in the case of a purchase or lease, upon the ground of mere undervalue, a *bonâ fide* letting or sale, which would be binding on the principal himself, will not be equally binding on him where he acts through his agent, if that agent has acted fairly and honestly. I could not do a more mischievous thing than to avoid a contract, *bonâ fide* entered into by an agent, because it is proved that the

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property was worth a shilling or two more rent than he obtained for it.

[His Lordship then, after minutely going through the evidence of value, came to the conclusion that the rent agreed to be paid by Mr. *Dyas* was the best rent that could, under the circumstances, have been obtained for the lands.]

I have examined the question of value with care, in order to show that what Mr. *Dyas* has given is fairly equal to the most that could have been obtained for the property; but it is worth while to consider what is the law upon this point, and whether there is anything in the objection, even supposing that this was a case where a higher offer had been made. In *Doe v. Radcliffe*(a) the defendant claimed under a lease made by a tenant for life under a power to lease at the best rent. The rent reserved was 43*l.* per annum. It was proved that the tenant for life, before he made the lease, had two offers from other persons, one at 50*l.* and the other at near 60*l.* a year; it was therefore said, that 43*l.* was not the best rent. The jury found that it was; and a motion for a new trial having been made, "the Court refused the rule, there being no pretence to impeach the lease on the ground that the letting at 43*l.* a year was not done *bona fide* by the tenant for life at the time; he not having taken any fine or other consideration for the lease, and having a manifest interest to get the best rent, which, under all the circumstances, and due consideration of the ability and good management of the tenant, could reasonably be obtained. And they said that, where the transaction was fair, and no fine or other collateral consideration was taken by the tenant

(a) 10 East, 278.

, leasing under the power, or injurious partiality
tly shown by him in favour of the particular lessee,
ought to be something extravagantly wrong in the
y, in order to set it aside on this ground ; for in the
of a tenant there were many things to be regarded
the mere amount of the rent offered." I ask, is there
y extravagantly wrong in this bargain, which would
me to withhold the aid of the Court to enforce the
t? In the case of the *Queensbury* leases(a) Lord
said, " There is but one criterion which our Courts
attend to as the leading criterion in discussing the
n whether the best rent has been got or not ; that is,
r the man who makes the lease has got as much for
as he had got for himself; for if he has got more for
' than for others, that is a decisive evidence against
The Court must see that there is reasonable care and
ce exerted to get such rent as, care and diligence be-
rted, circumstances mark out as the rent likely to be
d." These authorities are conclusive as regards this
n. The evidence as to value in this case is so clear,
would seem extraordinary how the objection arose,
t not that Mr. *Cruise* was led to suppose that there
me unfair dealing on the part of Mr. *Smyth*. It is
that a charge of fraud is put forward which is not
ed upon some fact proved in the cause ; but here
s no foundation whatever for the allegations of Mr.
. I should, therefore, feel no difficulty, upon that
l, of enforcing this contract against Mr. *Cruise*, even
ntract to bind the remainder-man, and leave him, if
ught proper, to impeach the lease ; as was done in
v. *Corry*(b), in which a bill was filed against a tenant

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(a) 2 Sugd. on Powers, 423. (b) Wallis' Rep. 278.

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for life, with power to lease at the best rent, for a specific execution of a contract to grant a lease ; and the tenant for life objected that the rent reserved was not the best rent, and that the remainder-man ought to be a party to the suit. Lord *Lifford* overruled the second objection, and decreed a specific performance ; but directed a clause to be inserted in the lease whereby the defendant should not be bound to warrant the title against the person in remainder.

If this had not been my opinion, I must have decreed a partial execution of the agreement against *Cruise*, for the term of his life. There are some authorities upon this subject ; but none of them stand in the way of such a decree. In *Lawrenson v. Butler*(a) there was a power, with the consent of trustees of the settlement, to lease for lives renewable for ever, at the best rent, without fine. The tenant for life, without the consent of the trustees who refused to join, and the lessee colluded to have a lease granted in reality for a fine, though not apparently so : for it was agreed that the furniture, &c., was to be valued, and the lessee was to pay double the valuation to the tenant for life. Lord *Redesdale* held, that he would not enforce an improper contract against the remainder-man, which no Judge in Equity will ever do ; but he also held, though he had not occasion to decide that point, that there could be no partial performance of the agreement ; for that the parties did not mean to bind the interest, which the tenant for life had in the lands, but to commit a fraud on the power ; and, therefore, that the Court would not assist either party. The state of the title, I may observe, was known to the parties, and they intended to execute the power illegally.

(a) 1 Sch. & Lef. 13.

v. Lord Landaff(a) was also the case of a power to let the best rent; and upon the making the agreement which the lessee sought to enforce, an old lease of lands, one life in which was *in esse*, was surrendered. The surrender of the old lease was part of the consideration for granting the new; the best rent, therefore, was reserved,—there was a great difference. Lord Mansfield dismissed the bill; for the lessee knew that, at the time contracted for the new lease, the life in the old lease was at the point of death; which fact he concealed from his lordship. That case, therefore, is not an authority against enforcing a partial execution of the contract; it was a case decided. In *O'Rourke v. Percival*(b) the lands were let to the husband for life, with power to him and his wife, during their respective lives, to lease at the best rent, without fine. In 1779 the husband and wife demised the land to the defendant for thirty-one years; and, fourteen years before the expiration of that lease, the husband alone agreed to let it on another lease to the plaintiff, and took a fine. The plaintiff filed to enforce the agreement so far as the husband was bound to carry it into effect; but Lord *Manners* refused to decree a partial performance. There again the plaintiff alleged that there was a fraud on the power. The Chancellor also held, on this, that there was no evidence to show that the plaintiff reserved and the fine were, together, the full value of the lands. I do not understand that objection, or what is to be given to it; but I think the bill was properly dismissed in that case. *Harnett v. Yielding*(c) depends really upon the construction to be given to the medium, which Lord *Redesdale* properly held did not

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B. & Beat. 241.
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(c) 2 Sch. & Lef. 549.

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give the lessee a right to a renewed lease ; but he certainly, in that case, laid down some rules which were not called for. In that case the lessor covenanted, by the old lease, to execute a further lease for twenty-one years, at any time during his life, at the old rent ; and Lord *Redesdale* thought that covenant was objectionable. I cannot entirely go along with him in that proposition ; for though it would be an objection if, at the time when the contract is to be performed, it is not the best rent, I do not see how it is an objection, if, at that time, the old rent is the best rent. What harm is done in such a case, when the new lease is within the power ? In *Doe d. Bromly v. Bcttison*(*a*), a lease under a power was objected to, because the tenant for life covenanted that, during his life, he would, at the request of the lessee, every year renew the lease for the same term and at the same rent ; but Lord *Ellenborough*, in pronouncing the judgment of the Court overruling the objection, said, “Then, as to the covenant for renewal, it is said it has a tendency to induce the lessor to run the question on the *quantum* of rent reserved very closely ; for if he renewed at the end of twenty years from the first granting of the lease, the remainder-man might have a lease fixed on him for twenty-one years from that time, reserving less than the best rent which then could have been reserved ; but the answer is, that if the fact were so, the lease would be void, and the remainder-man might bring his ejectment and recover the premises.” That does not quite agree with the position of Lord *Redesdale*. There are other cases, which it is unnecessary to refer to more particularly, which do not support the doctrine of Lord *Redesdale* on this subject ; and my impression is, that if the best rent be reserved at the time,

(a) 12 East, 304.

ract ought to be enforced. But then the question,
 the plaintiff was entitled to a partial performance
 greement, arose. Lord *Redesdale* refused it; for
 that the lessee knew the party had only a limited
 f leasing, and intended to execute it; and that there
 mutuality. I doubt whether that can be main-
 s the law of the Court, when there is no fraud in
 saction. If there be a *bonâ fide* intention to exe-
 power, and that contract cannot be carried into
 do not see why the interest of the tenant for life
 not be bound, to the extent he is able to bind it,
 here be some inconvenience. In a late case, *Gra-*
Oliver(a), the Master of the Rolls, alluding to the
 es in these cases, observed, that the Court had
 it right, in many cases, to get over these difficulties,
 urpose of compelling parties to perform their agree-
 and that it was right they should be compelled to
 here it can be done without any great preponde-
 inconvenience. If, therefore, it had appeared in
 , that Mr. *Dyas* was aware that the lease was to
 to him by means of the execution of a power, then,
 h the rent were not strictly the best, yet I should
 en of opinion, this being a fair transaction, that Mr.
 ould be entitled to a performance of the contract, to
 nt of binding the life estate of Mr. *Cruise*: as in
 referred to, in the note to *Lawrenson v. Butler(b)*,
 n incumbent contracted with a tenant in tail in re-
 for the purchase of the advowson, and, on the faith
 ontract, built a better house on the glebe; after-
 he person in whom the life estate was vested re-
 join in making a tenant to the *præcipe* in order that

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Beav. 128.

(b) 1 Sch. & Lef. 19.

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a recovery might be suffered ; and consequently no sufficient conveyance could be made of the advowson. But Lord *Thurlow* held that the purchaser was entitled to a partial performance of the contract ; for that, on the faith of it, he had expended money on the glebe. So here, Mr. *Dyas*, on the faith of this contract, has in the course of the first year of his term expended upwards of 700*l.* in lasting improvements ; and, therefore, I should have held, if it had been necessary to decide the point, that Mr. *Dyas* was entitled to a decree for a partial performance of the contract.

I have gone into the consideration of this point, merely to show Mr. *Cruise* that, in any view of the case, he could not have succeeded to the extent he desired ; but I hold without difficulty, that this is a valid contract binding upon the inheritance, and that the contract must be specifically performed by the grant of a lease for the whole term mentioned in it ; and Mr. *Cruise* must pay the costs of the suit.

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June 4, 16.

An indenture of the 13th of October, 1838, *Andrew C. Palles*, the defendant, mortgaged certain houses and lands in the county of the city of Dublin, to *George Ignatius Goold*, to secure the repayment of the sum of 3019*l.* with interest. On foot of this mortgage, *George I. Goold*, in May, 1842, obtained a decree for a foreclosure and sale.

Sir George Goold (who was the father of *George I. Goold*) and *Henry Valentine Goold*, his eldest son, having become indebted on foot of two several bills of costs, to *Messrs. H. Triston and Sebastian C. Hardey*, English solicitors, *Edward Simmonds*, the plaintiff, as their attorney, brought two actions in the Queen's Bench in Ireland, one against *Sir George Goold* and *H. V. Goold*, and the other against *H. V. Goold* alone, for the recovery thereof. These actions were subsequently referred to arbitration; and before any award was made, *A. C. Palles*, who was then in custody under an attachment for not obeying the decree of 1842, proposed to effect an arrangement of the claims of *Messrs. Triston and Hardey*, and also of the demand of *George I. Goold* on foot of the mortgage against himself; which having been assented to by all the ne-

Palles being indebted to *Ignatius Goold* in 3000*l.*, and *Sir George G.*, the father of *Ignatius*, being indebted to *T. & H.* in 1000*l.*, for recovery of which they had instituted an action at law against him; an arrangement was entered into, part of which was, that the action against *Sir George G.* should be discontinued; and that *Palles* should pay the costs of it: And *Palles*, pursuant to the agreement, mortgaged his estate for 1400*l.* to a trustee, upon trust, *inter alia*, to secure to *Simmonds*, the attorney for *T. & H.* in the action, the costs of the plaintiffs in that action, to be paid as therein mentioned.

Simmonds, though named in the declaration of trust, was not a party to the arrangement. Held,—That he was not entitled, as a *cestui que trust* under the deed, to institute a suit to carry the trusts of it into execution; and that, having done so, the objection might be taken by any party to the suit.

The principle of *Garrard v. Lord Lauderdale* (2 R. & M. 451), not to be extended.

Tibbs v. Glamis (11 Sim. 584) observed upon.

Distinction between voluntary settlements, where the object of the donor is bounty; and statutory conveyances in trust to pay debts, to which the creditors are not parties.

By suffering the bill to be taken as confessed against him, the defendant admits the facts stated in it; but the plaintiff must show that the facts so admitted entitle him to relief.

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cessary parties, the proceedings in the two actions were discontinued, and *A. C. Palles* was discharged from custody. The terms of the agreement between the parties are contained in the recitals in the articles of the 10th of September, 1842, hereinafter mentioned. Pursuant to that arrangement two documents were executed: the first was an indenture of the 1st of September, 1842, made between *A. C. Palles* of the one part, and *Sebastian C. Hardey* of the other part; whereby *A. C. Pallas* mortgaged the premises comprised in the mortgage of 1838, to *Sebastian C. Hardey*, to secure the payment of the sum of 1400*l.*, with interest, on the 1st of November then next ensuing. The other was an instrument under the hand and seal of *A. C. Palles* alone; it did not purport to be made *inter partes*, but was described in the instrument itself, as articles of agreement bearing date the 10th of September, 1842. It recited that two actions were then lately depending in the Queen's Bench in Ireland, in which *Triston* and *Hardey* were plaintiffs; in one of which Sir *George Goold* and *Henry V. Goold* were the defendants, and in the other of which *Henry V. Goold* alone was the defendant; and that *Triston* and *Hardey* claimed therein, against the defendants, two sums, amounting together to the sum of 1500*l.* or thereabouts: that a suit was pending in the Court of Chancery, by *George I. Goold* against *A. C. Palles*, for the recovery of 2000*l.* and upwards: and that at the solicitation and request, and for the accommodation of *A. C. Palles*, it had lately been agreed "between the parties aforesaid," that *Triston* and *Hardey* should accept 1000*l.* in full for the amount of their claims in the two actions, together with their full costs as between attorney and client, in the two actions: and that it was also agreed "between the parties aforesaid," at the request and

r the accommodation of *A. C. Palles*, that he should be at liberty to set off the said sum of 1000*l.*, so agreed to be paid to *Triston* and *Hardey*, against the claim of *George I. Goold* in the said suit; and that *Triston* and *Hardey* should accept a security from the trustees of *Henry M. F. Goold*, charged upon certain estates in Tipperary and Cork, for the sum of 1000*l.*, being a sum then due from the said trustees to *A. C. Palles*: and that it was also agreed that the said sum of 1000*l.*, and the interest thereof, should be collaterally secured by *A. C. Palles*, by a mortgage of certain property belonging to him; and that it was likewise agreed that *A. C. Palles* should pay and discharge the full costs between attorney and client of the plaintiffs in the two actions; and that the same should be secured by *A. C. Palles*, by his bills or promissory notes, and should be collaterally secured by a mortgage of his property as aforesaid. And after further reciting that the costs of the two actions had been estimated to amount to 400*l.* or thereabouts; and that, by indenture of mortgage of the 1st of September, 1842, made between *James J. Hardey* and *Henry V. Goold* (the trustees of the estate of *Henry M. F. Goold*) of the first part, *Henry M. F. Goold* of the second part, *A. C. Palles* of the third part, and *Richard Foster* of the fourth part, certain estates in Tipperary and Cork were conveyed to *R. Foster* and his heirs, by way of mortgage, to secure the payment of the said sum of 1000*l.* and interest: and after reciting the mortgage of the 1st of September, 1842, from *A. C. Palles* to *Sebastian C. Hardey*, for the sum of 1400*l.*; and that said sum of 1400*l.*, so secured by the last mentioned mortgage, was intended to be a further security for the payment of the said sum of 1000*l.* and interest so secured to *R. Foster* as aforesaid, and to be a security for the costs between attorney and client of the

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plaintiffs in the two actions, and the costs and expenses of getting the first-mentioned deed executed; and also for the payment of the several bills thereafter mentioned: it was declared that *Sebastian C. Hardey*, his executors, &c., should stand possessed of the 1400*l.* and interest secured by the second mortgage, upon trust, in the first place, for the better securing unto *R. Foster*, his heirs, executors, &c., the payment of the sum of 1000*l.* secured to him by the first-mentioned indenture of mortgage; secondly, "to secure to *Edward Simmonds*, gentleman (the attorney for the plaintiffs in the said two actions), the costs of the plaintiffs in the said two actions, to be allowed as between attorney and client, and to be paid as follows, (that is to say), the sum of 100*l.* part thereof to be paid on or before the 15th day of December, 1842, and the balance of the said costs to be paid within two calendar months after the same shall be ascertained;" thirdly, to secure the payment of the expenses incurred or to be incurred by *Sebastian C. Hardey*, in procuring the first-mentioned indenture of mortgage to be executed by *Henry V. Goold* and *Henry M. F. Goold*, at their respective residences abroad.

In pursuance of the arrangement so entered into, credit was given to *A. C. Palles*, on foot of the sum due by him to *George I. Goold*, for the sum of 1000*l.*; and *A. C. Palles* made his promissory note, dated the 17th of March, 1843, to Messrs. *Triston* and *Hardey*, for the sum of 101*l.* 10*s.*, payable ninety-one days after date: and they endorsed it to the plaintiff in part payment of his costs.

The costs in the two actions were taxed to the sum of 371*l.* 2*s.* 10½*d.*, out of which the plaintiff had only been paid the amount of the promissory note. *A. C. Palles* was

several occasions, applied to by the plaintiff for payment of the balance of the costs; and frequently promised to pay the same, particularly by a letter of the 3rd of October, 1843, addressed to the plaintiff; but neglected to do so. Under the circumstances, the plaintiff filed the present bill, praying that *Sebastian C. Hardey* and *R. Foster* refused to join him as co-plaintiffs in the suit; and prayed that the sum of 1400*l.* might be decreed well charged on the mortgaged premises: and that the plaintiff might be declared entitled to be paid the balance due on foot of the taxed bill mentioned in the articles of the 10th of September, 1842; and if necessary, that an account might be taken of what was due to him on account of the costs mentioned or ordered to in the same articles: an account of the sum due to *R. Foster* on foot of the 1000*l.* mentioned in the same articles: and that *A. C. Palles* might be decreed to pay to the plaintiff the sum which should appear to be due to him, either with the costs of the suit; and also to *R. Foster* or *Sebastian C. Hardey* as his trustee, such sum as should appear to be due to *R. Foster*: and in default, a foreclosure sale, and for liberty to redeem the mortgage of 1838.

John Conlan was made a defendant to this suit, in respect of an equitable mortgage by deposit of title deeds, made to him in September, 1843, by *A. C. Palles*. By answer he submitted that the plaintiff was not a party to either of the deeds of the 1st or 10th of September, 1842; and that there did not exist any sufficient privity between him and *A. C. Palles*, or any other of the defendants, to enable him to maintain a bill in his own name for recovery of the said costs.

Sebastian C. Hardey, by his answer admitted that he

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was a trustee for *R. Foster* and the plaintiff of the mortgaged premises, according to their respective interest therein, as declared by the articles of agreement of the 10th of September, 1842.

The cause was heard upon an order to take the bill *pro confesso* against the defendant *A. C. Palles*.

Argument. Mr. Sergeant *Warren*, Mr. *Brewster*, and Mr. *Rogers*, for the plaintiff.

Mr. *V. Scully* for the defendant *Conlan*, cited and relied on *Worrall v. Harford*(a); *Page v. Broom*(b); *Garrard v. Lord Lauderdale* (c); *La Touche v. Lord Lucan*(d); *Wallwyn v. Coutts*(e); *Acton v. Woodgate*(f); *Foster v. Blackstone*(g); *Williams v. Everett*(h); *Scott v. Porcher*(i).

Mr. Sergeant *Warren* cited and relied on *Ryall v. Ryall*(k); *Ellison v. Ellison*(l); *Pulvertoft v. Pulvertoft*(m); *Ex parte Pye*(n).

Judgment. THE LORD CHANCELLOR :—

This case has taken an extraordinary turn, arising partly from the character of Mr. *Scully's* client, as stated

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| (a) 8 Ves. 4. | (h) 14 East, 582. |
| (b) 4 Russ; 6. S. C. 2 R. & M. 214. | (i) 3 Mer. 652. |
| (c) 3 Sim. 1; S. C. 2 R. & M. 451. | (k) 1 Atk. 59. |
| (d) 7 Cl. & F. 772. | (l) 6 Ves. 656. |
| (e) 3 Mer. 707; S. C. 3 Sim. 14. | (m) 18 Ves. 84. |
| (f) 2 M. & K. 492. | (n) 18 Ves. 140. |
| (g) 1 M. & K. 297. | |

the record, and partly from the circumstance that Mr. ~~es~~ has allowed the bill to be taken *pro confesso* against ~~est~~ *Palles* is simply an admission by him of the facts ed in it; but the question still remains, is the plaintiff ot a *cestui que trust* under the deed of arrangement, so o entitle him to file this bill? Allowing the bill to be n *pro confesso* is an admission of the facts stated, but of the claim of the plaintiff to sustain the bill.

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he cases which were understood to apply to the present e *Garrard v. Lord Lauderdale*, and others of that class; the counsel for the plaintiff has altogether avoided en- g into the consideration of them, for the simple reason , if they apply, they are quite decisive against the claim is client. Those cases have certainly gone a great th; and I am not disposed to carry the principle fur- than authority compels me: but they establish this, if parties make arrangements between themselves, be- the back of a third person, even though they should are a trust for the benefit of that third person by e, if that be not in the nature of a settlement, though ntary, but is merely an arrangement for the benefit of parties themselves who enter into it, the third person ot, upon that naked state of circumstances, file a bill stablish his demand as a *cestui que trust*. *Garrard v. d Lauderdale*(a) went far enough; for there the creditor , in point of form, a party to the deed, and the deed communicated to him: yet it was held that that cir- stance did not enable him to file a bill to enforce the t. *Worrall v. Harford*(b) was, in that respect, dif-

(a) 3 Sim. 1; S. C. 2 R. & M. 457.

(b) 8 Ves. 4.

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ferent: the deed contained a mere general provision that the trustees should, out of the trust property, pay the costs of carrying the trust into execution; not stating the particular attorney to whom the payments were to be made: and an attorney having a title to costs considered himself a *cestui que trust* under the deed, and filed his bill, which was dismissed.

In the last case upon the subject, which has not been cited^(a), but to which I have had occasion lately to refer, the Vice-Chancellor held one way and the Chancellor another. It was of this nature. Several persons were interested in a fund, in respect of which a suit had been instituted: they made an arrangement of their claims between themselves, and assigned the fund to trustees; and one of the trusts was, expressly, to pay to a defendant in the suit, who was not a party to the arrangement, his costs, to which one of the parties to the deed was liable. The fund was realized and actually in the hands of the trustees; and they not having paid the costs, a bill was filed by the third party to have the trusts carried into execution and his costs paid. The Vice-Chancellor was of opinion that these circumstances distinguished the case from *Garrard v. Lord Lauderdale*; and took this distinction, that it was not the case of a person voluntarily making a provision for payment of his creditors, but of several persons, some of whom were liable to the demand, agreeing amongst themselves that a particular fund, in which they were all interested, should be the fund for payment of it. Lord *Cottenham* reversed that decree, and said, that it was competent for any of the defendants to make the objection, and

(a) *Gibbs v. Glumis*, 11 Sim. 584.

was immaterial what interest the party making the bill had : and he held, even in that case upon which there would have had considerable doubt, that the plaintiff could not maintain his bill.

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This case is not so strong as that ; for here Mr. *Palles* was bound with *Triston* and *Hardey* to satisfy a demand and to pay costs to the plaintiff, to which he was not liable, in consideration of another demand, to which he was liable, in part discharged. *Simmonds* was the attorney for *Triston* and *Hardey* ; and the principal money and the costs were, in fact, due to *Triston* and *Hardey* ; but the money was due from them to *Simmonds* : they were, however, disclaimed by *Triston* and *Hardey*, who accepted of the compromise only on the terms of the costs being paid. The result was, that the 1000*l.* (the sum for which *Triston* and *Hardey*'s claim was compromised), should be paid out of the estates of *Henry Michael Francis Goold*, who was indebted in that amount to Mr. *Palles* ; and a charge of those estates for that sum was accordingly executed by the proper parties to Mr. *Foster*. Mr. *Palles* was to set that sum off against the demand which *Georgeus Goold* (the son of Sir *George Goold*, who was the agent of Messrs. *Triston* and *Hardey*), had against him ; and to counter-secure the payment of the 1000*l.* to Messrs. *Triston* and *Hardey*, and also to secure the payment of the money in the actions at law ; for which purpose he executed a mortgage of his own property to *Sebastian Hardey* alone, for the sum of 1400*l.* A few days after, on the 10th of November, 1842, articles were signed by Mr. *Palles* alone, confirming the arrangement which had been entered into, in that it was agreed that the 1000*l.* and interest should be laterally secured by Mr. *Palles*, by a mortgage of

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property belonging to him; and that Mr. *Palles* should pay the full costs, between attorney and client, of the plaintiffs in the two actions which had been brought by Messrs. *Triston* and *Hardey* against Sir *George Goold* and *Henry V. Goold*, and that the same should be secured by his bills or promissory notes, collaterally secured by a mortgage of his property: and that the costs of the two actions had been estimated to amount to 400*l.* or thereabouts. The articles then recite the mortgage for the 1000*l.*, and the mortgage by Mr. *Palles* for 1400*l.*; and that the said sum of 1400*l.* was intended to be a further security for the payment of the 1000*l.*, and to be a security for the costs between attorney and client of the plaintiffs in the two actions, and the costs and expenses of getting the first-mentioned deed executed; and also for the payment of the several bills after mentioned. In the whole of this statement of the arrangement between the parties, there is not a word said with respect to *Simmonds*.

[His Lordship then read the witnessing part of the deed of the 10th of September, 1842.]

Now, it is clear that the costs of procuring the mortgage of the 1st of September, 1842, to be executed by *Henry M. F. Goold* and *Henry V. Goold*, never could have been recovered by the attorney employed, as a *cestui que trust* under the deed.

The question is, whether, on the authorities, the direction in the deed, to secure to *Simmonds* the costs of the plaintiffs in the two actions, constitutes *Simmonds* a *cestui que trust* under the deed. In the last case which I have referred to, the party to whom the money was to be paid

named, as here; and the parties to the deed were
selves, or some of them, responsible to him for the
; nevertheless it was held that he was not entitled to
bill for payment of the money secured to him by the

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My present opinion is that, under these authorities,
Simmonds cannot maintain a bill to carry into execution
trust, to which he was not a party. I understand the
rel for the plaintiff to admit this, but they put the case
other grounds.

is said that this is a case in which it is not possible to
te the transaction itself; but I have satisfied myself
hat view cannot be maintained upon the mere ground
Mr. *Palles* has allowed the bill to be taken *pro*
se against him: for, taking the facts to be as
l in the bill, the question remains whether, on the
rities, *Simmonds* is a *cestui que trust* under the deed.
ter has been read which, I think, does not vary the

It was written after the execution of the deed, and it
shows that *Palles* meant to pay *Simmonds*.

is one of the circumstances relied on by the defendants
st the claim of *Simmonds*, that it is stated in the bill
he arrangement was, that the bills of exchange to be
to secure the payment of the costs, were to be given,
o *Simmonds*, but to *Triston* and *Hardey*. With
was the contract entered into? With *Triston* and
ey. Was any contract entered into with *Simmonds*?
. Did *Simmonds* release his debt? No. Did he
any stipulation that he would not proceed against his
pal debtors, if he were included in this deed? No.
is nothing to show that he was intended to be a
que trust under the deed; and the fact of the bill

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being given to *Triston* and *Hardey*, and that they endorsed it to *Simmonds*, is consistent with the intention, that the dealing was to be confined to the parties immediately concerned, namely, *Palles* on the one side, and *Triston* and *Hardey* on the other ; and that *Simmonds* was to have the remedies he previously had against his own clients, and also a security upon the bills, and an additional security (though he could not himself enforce it), in the knowledge of the fact, that there was an estate pledged to secure the payment of his costs. The objection here is, not that this trust cannot be enforced ; for it may be enforced ; but that *Simmonds* is not a *cestui que trust* who can enforce it.

The counsel for the plaintiff avoided answering the authorities I have referred to ; but they put the case, irrespective of those authorities, upon the doctrine in *Ellison v. Ellison*(a), *Ex parte Pye*(b), and *Pulvertoft v. Pulvertoft*(c). But those authorities apply to a different state of things. This is not a voluntary settlement, in which, without reference to any claim on the part of *Simmonds*, the parties thought fit to make him a *cestui que trust* ; where he might enforce the trusts, the property having been transferred, and the relation of trustee and *cestui que trust* actually subsisting between the parties : but this is a transaction relative to the security of money, entered into between *A.* and *B.*, the benefit of which, to a certain extent, *C.* is to have ; but not as a benefit which he himself can enforce. I take it to be clear, that the authorities to govern this case are the class to which *Garrard v. Lord Lauderdale* belongs, and not *Ellison v. Ellison* and the others of that class.

(a) 6 Ves. 656.
 (b) 18 Ves. 140.

(c) 18 Ves. 84.

already had occasion to observe^(a), that it is of great importance, with reference to this doctrine, to have a line perfectly marked and distinct between those cases of authorities. I will examine the case carefully before I pronounce my decree.

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HONORABLE CHANCELLOR:—

A mortgage, which is now in question, was made to *John Hardey* as the representative of the firm of *Triston Hardey*; and the declaration of the trust, upon which the plaintiff *Simmonds* founds his right, was executed by *Palles* alone. It states the fact that *Triston* and *Hardey* had brought actions against *Sir George Goold* and *Valentine Goold*, which were defended, and in those actions *Simmonds* was the attorney for the plaintiffs. *Palles* was indebted to *George Ignatius Goold*, member of the *Goold* family, who had instituted proceedings against him for recovery of the money due; and under these circumstances it was proposed that *Palles* should pay 1000*l.* to *Triston* and *Hardey*, which they were to accept in satisfaction of their demands; and 100*l.* should be set off by *George Ignatius Goold*, in satisfaction of his demand against *Palles*.

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Palles claimed to be entitled to 1000*l.* out of the estate of *Michael Francis Goold*, which was the subject of a former suit in this Court: and, accordingly, a mortgage was executed by *Henry M. F. Goold* and his trustees, to secure to *Triston* and *Hardey* for 1000*l.*, which was paid to *Triston* and *Hardey*.

(a) See *Browne v. Cavendish*, ante, vol. i. p. 136.

1845. That was a payment made on account of *Palles*.
 SIMMONDS *Palles* executed the present mortgage for 1400*l.* to
 v. *bastian Hardey*, which, in truth, was a mortgage to
 PALLES. *ton and Hardey*.
 Judgment.

The articles of the 10th of September, 1842, are, in the only document to show what the contract really was. They recite what I have mentioned, and further, that the solicitation and request, and for the accommodation of *Andrew C. Palles*, it was agreed between the parties aforesaid (that is, Messrs. *Triston* and *Hardey*, Sir *George Goold* and *Henry V. Goold*, *George Ignatius Goold*, Mr. *Palles*, who are the only persons previously named in the articles), that *Triston* and *Hardey* should accept 1000*l.* for their claims in the two actions, together with their costs in the two actions; and that *Palles* should be at liberty to set off the said sum of 1000*l.* against the claim of *George I. Goold* in the said suit; and that *Triston* and *Hardey* should accept a security from the trustees of *H. M. F. Goold*, upon estates in Tipperary and Cork for the sum of 1000*l.*, being a sum due from such trustees to *Palles*; that the said sum of 1000*l.* and interest should be collaterally secured by *Palles*, by a mortgage of property long to him; and that *Palles* should pay the costs of the plaintiffs in the said two actions; and that the same should be secured by *Palles* by his bills or promissory notes, and should be collaterally secured by a mortgage of his property as aforesaid. So that *Palles* was to pay the costs, and collaterally secure them and the mortgage on *H. M. F. Goold's* estate, by a mortgage of his own estate. The costs were also to be secured by bill of exchange. The construction to be given to that agreement is, that the bills were to be given to *Triston* and *Hardey*.

or they alone were liable to their attorney for their own costs in the action which they discontinued ; but *Palles* was liable to them. The articles then state the estimated amount of the costs, viz., 400*l.* ; the mortgage of *Henry M. F. Goold's* estate to *Foster* for 1000*l.* ; the mortgage by *Palles* to *Sebastian Hardey* for 1400*l.* ; that the 1400*l.* was intended as a further security for the payment of the 1000*l.* and interest secured to *Foster*, and to be a security for the costs of the plaintiffs in the two actions, and the costs and expenses of getting the first-mentioned deed executed, and also for the payment of the several bills after-mentioned. There is an inaccuracy in that respect ; for the bills are not afterwards mentioned. In all these recitals there is nothing said as to *Simmonds* as the attorney for *Triston* and *Hardey* ; but the whole arrangement and the recitals are confined to *Triston* and *Hardey*, and *Palles*. It is then declared by *Palles*, that *Sebastian Hardey* is a trustee, first to secure to Mr. *Foster* 1000*l.* and interest ; and, secondly, "to secure to *Edward Simmonds*, gentleman (the attorney for the plaintiffs in the said two actions), the costs of the plaintiffs in the said two actions, such costs to be allowed as between attorney and client," and to be paid in the manner therein mentioned ; and, thirdly, to secure the payment of the expenses incurred or to be incurred by *Sebastian Hardey* in procuring the first-mentioned mortgage to be executed by *Henry V. Goold* and *Henry M. F. Goold*, at their respective residences abroad. I need hardly observe that, as to these last costs and expenses, *Sebastian Hardey* might have employed some other attorney to procure the execution of the deed, who, therefore, would have a demand against him, but could not claim under the deed.

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The question is one of law, whether *Simmonds* is en-

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titled to file a bill as a *cestui que trust* under this deed, to have that trust (for, no doubt, there is a trust for his benefit) carried into execution. That question depends, first, on what was the intention of the parties; and next upon the authorities. Was there any intention to make *Simmonds* a *cestui que trust*? Clearly not upon the ground argued, as being a *cestui que trust* claiming under a voluntary settlement. In all the cases of that class there was an intention to constitute the relation of donor and donee. The settlement was matter of bounty; made upon good consideration, as connexion or relationship, or it may be some other proper motive; but still it was bounty. I am clearly of opinion that this case does not fall within that class of cases; in which the distinction is settled, that if the property is actually vested in trustees, and the relation of trustee and *cestui que trust* established, the *cestui que trust*, though a volunteer, may file a bill to carry the trust into execution. I think this case falls within that class of cases, in which a party provides for the payment of an obligation upon himself, without any dealing with the person for whom the provision is made, and without any consideration moving from that person. *Simmonds* was the attorney of *Triston* and *Hardey*. As such, he had a right of action against them. He never lost that right; he gave no time; he entered into no obligation with them not to sue; but the contract was between *Triston* and *Hardey*, and *Palles*, for their own benefit, that *Palles* should pay *Simmonds* his costs: but, notwithstanding that agreement, *Simmonds* might have sued *Triston* and *Hardey*.

I never was quite reconciled to the authorities. I submit to them, as I am bound to do; but I will not carry them further. *Garrard v. Lord Lauderdale* followed the prin-

laid down by *Lord Eldon*, as to which there was no doubt: whether the facts of that case warrant the decree on another question; and men's minds may differ on it. As to the principle, no person will dispute it. It was decided before that case, that if a man, without communicating with his creditors, make a provision for paying them, which they have not bargained, he may, before the execution of the trusts, destroy them. The questions in that case were, whether, under the circumstances, the Duke of *Devonshire* had exercised that power; and whether it was competent for him to do so. Without going through the cases, I refer to *Gibbs v. Glamis*(a), a remarkable case, one in which learned persons differed: for the decree of the Vice-Chancellor was reversed by the Chancellor; and I am not satisfied that some learned persons would not prefer the first decision. That case was of this nature. A Mr. *Hele*, claiming to be interested in a sum of 4000*l.*, filed a bill in respect of it. *Gibbs*, the plaintiff, was, I suppose, properly a defendant in that suit. There was a contest as to who was entitled to the 4000*l.*; and the several claimants came to an agreement between themselves, that they would divide the money amongst them in certain proportions; and that all the costs of the suit should be provided for, in particular *Gibbs*' costs: and, without any communication with him, they assigned the 4000*l.* to trustees, in trust, first, to pay the costs and expenses of all parties to be decided in or about the suit of *Hele v. Fernie*, or of the said or otherwise relating to their claims on the 4000*l.*, as between solicitor and client; and also the costs of *Gibbs*, and other costs; and then to pay 800*l.* to *Hibbert*, 1800*l.* to *Hele*, and the residue to Lady *Glamis*. So that Lady

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(a) 11 Sim. 584.

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Glamis had no right to receive anything until after payment of the costs to *Gibbs*. There was as express a trust to pay *Gibbs* his costs as to pay Lady *Glamis* the residue. The trustees received the money, and paid the other persons named in the deed; and were willing to pay *Gibbs*, when Lady *Glamis* objected that he was not entitled to be paid out of that fund. The Vice-Chancellor held that the several parties to the deed had a common interest in the payment of *Gibbs*' costs out of the fund; that the agreement had only been entered into on the condition that payment of *Gibbs*' costs would be provided for out of the fund; and, therefore, that the case was not within the authorities; and he sustained the bill: but the Chancellor reversed that decree; and that reversal appears to have been submitted to. He said, in his judgment, that *Hele* was liable to pay the plaintiff, *Gibbs*, his costs; and in order to protect him against the consequences of that liability, the parties provided, incidentally, that the plaintiff's costs should be paid out of the fund: that the question then was, whether that provision gave the party, whose costs were to be so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund, not having been a party to the arrangement, and the agreement having been made between the parties interested in the fund, for their own benefit or convenience; and that the case was not distinguishable from *Garrard v. Lord Lauderdale*, and the other cases which had been cited: and he added, that the objection was one which was open to all the defendants; and that it was immaterial what interest the party, who made the objection, had.

That is a much stronger case than the one before me; for there several parties agreed to vest a common fund in

es, upon trust to pay to a person named, an obligation person held against one of them. The difficulty was, Lady *Glamis* never could have recovered the residue after payment of the costs to *Gibbs*. That case, more, proves this: that in order to give to a person in the position of *Gibbs*, or *Simmonds* in the pre- case, a right to file a bill, it is not sufficient to have a declared for his benefit, and to show that the trust be executed. He cannot assert his remedy in this : he must wait until the person liable to him calls execution of the trust. Mr. *Hele* might have filed a have the trusts executed, and have insisted on the es paying those costs to *Gibbs*, or to him for *Gibbs*, the residue was paid over to Lady *Glamis*; and if trustees paid Lady *Glamis* without paying *Gibbs*' they would be answerable to *Hele* for a breach of

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re *Triston* and *Hardey* contracted that their costs l be paid; and *Palles*, with whom they contract, and declares that they are to be paid to *Simmonds*, attorney. If they are not to be paid to him as a gift, not file a bill as a *cestui que trust*; he must be con- to pursue his own remedy against his clients, who pursue their remedy against the trustees. *Sebastian* ry, besides, is one of the persons who is personally to *Simmonds* for these costs, and he is also the trus- the fund, and is entitled to the possession of it. It , therefore, be impossible to extend the doctrine to ase; for the party subject to the obligation is the who, as trustee, has the means of paying it.

ave looked into the pleadings, for it was said that they

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distinguished this case from the authorities. I do not think they do: on the contrary, they make rather against *Simmonds*; for the bill expressly states that, in pursuance of the contract, *Palles* gave a bill of exchange for the first instalment of the costs to *Triston* and *Hardey*, and that they endorsed that bill to *Simmonds*. That shows that there was to be no direct communication between him and *Palles*; and that it never was intended that he should have the liberty of filing this bill.

The only other circumstance is, that *Sebastian Hardey* says, by his answer, that he is a trustee for *Simmonds*, *Foster*, and *Palles*. That is of no consequence. He is a trustee for *Simmonds*, but not in the sense which would authorize *Simmonds* to file a bill as *cestui que trust*. He is trustee for *Simmonds* in the same sense as the defendants in *Gibbs v. Glamis* were trustees for *Gibbs*; and yet the bill in that case was dismissed.

The bill has been taken *pro confesso* against *Palles*. That only amounts to an admission of the facts stated in the bill: it still remains for me to consider whether I ought to make a decree on those facts or not. I am of opinion that I ought not to make a decree against *Palles*; and that, on the facts confessed, *Simmonds* had no right to file the bill; and it must therefore be dismissed with costs.

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case an issue had been directed to try whether *Robert Creagh*, of Dangan, in the county of Clare, Esq., was of sound mind at the respective times when he executed his will, April, 1787, or the deed of the 18th of September, 1789; or the deed of the 2nd of November, 1789; or at those times he had a lucid interval. The plain issue had to support the sanity of *Robert Creagh*.

The case was tried at the Spring Assizes, 1845, for the county of Clare, before *Jackson, J.* It appeared from the evidence at the trial, that under an inquisition held in 1793, *Creagh* was found to be a lunatic; and that he became so about March, 1786: that, at the time when the instruments in question were executed, he laboured under various delusions; and amongst them, that certain persons were endeavouring to poison him; that he had no control over his stomach; and that his thumbs were ulcerated. On ordinary topics he did not exhibit marks of insanity; on subjects of his delusion were touched upon, he im-

pression had been touched upon.

of the parties to a particular instrument, are properly to be taken into consideration whether it was executed during a lucid interval.

dependent on the party supporting a deed executed by a lunatic, during the time of the inquisition, to show clearly that it was executed during a lucid interval.

has been insane and afterwards recovers his reason, it is not sufficient, in order to make an act done by him after his recovery, to show that he was not as sound a man in his mind as before his insanity. All that the law requires is, that a man should have possessed reason, so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect.

question whether a person, found a lunatic, was sane at a particular time, a pedigree executed by him, before the time in question, is admissible in evidence, if the deed is not produced or accounted for. And orders and reports made in the matronage are admissible to show that such orders and reports were made upon the facts therein, but not as evidence of the truth of the facts therein mentioned.

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A deed was executed by a person, who at the time was insane upon particular subjects.

Quære:—whether the jury, being satisfied of the existence of the morbid feeling at the time of the execution of the deed, though not then called into activity, are at liberty to say that, as the lunatic was reasonable in all other respects, his deed was valid.

Quære:—if a man is partially insane, and that partial insanity is never removed from his mind, is he capable of entering into solemn acts which he would not have entered into, if the sub-

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mediately manifested symptoms of mental derangement, and became incapable of transacting business of any kind. In July, 1786, he married; and was shortly afterwards taken away from his home and wife, by his brother, *Richard Creagh*, who from thenceforth, until *Robert Creagh* was found a lunatic by inquisition, kept him under his immediate control; and it was while he was under such control, that the will and deeds in question, whereby *Robert Creagh* purported to settle his property in favour of *Richard Creagh* and his issue, were executed. Several orders in the matter of the lunacy, and reports made thereunder, and orders thereon, were given in evidence by the defendant.

The learned Judge told the jury that the presumption of law is, that every man is of sound mind, until the contrary appears. That, in this case, the inquisition found *Robert Creagh* to have been of unsound mind at the time of the inquisition, and that he became so about March, 1786. That such finding was *primâ facie* evidence that he was of unsound mind at the respective dates specified in the leading order, as the dates of the will and deeds therein mentioned. That it was therefore cast upon the plaintiff in the issue to prove soundness of mind, or a lucid interval, at the time of the execution of the instruments, or one or more of them. And he informed them, that, in his opinion, it was not necessary, in order to constitute a lucid interval, that the subject thereof should be restored to as vigorous or as active a state of intellect as he may have enjoyed previous to his visitation with lunacy; but that they ought to be satisfied he was restored to a healthy state of mind, free from delusion, in order to warrant them in finding a lucid interval.

Mr. Bennett, for the plaintiff in the issue, objected to the

turned Judge allowing a report of 1806, and several orders in the matter of the lunacy, to go to the jury. The Judge had asked the counsel on both sides, early in his charge, whether they would consent that all documents given in evidence at both sides should go to the jury; and was answered, at both sides, that they would. He, therefore, let them go to the jury, telling them, that the recitals in the orders and the statements in that report were not evidence of the facts contained therein; and cautioning them not to regard them further than as showing that, in fact, such orders were made upon the grounds stated therein; and that such and such matters were reported to the Chancellor, in pursuance of such an order of reference.

Mr. Bennett also objected that the Judge should tell the jury, that, although they believed *Robert Creagh* laboured under a delusion, yet they might believe he enjoyed a lucid interval if they believed him rational in all other respects, except on the subject of the delusion. The learned Judge declined so to tell the jury: and after he had received his charge, Mr. *Pigot*, for the plaintiff, called upon him to tell the jury, that if they believed that any of the instruments mentioned in the issue were executed in a lucid interval when *Robert Creagh* was not under the influence of delusion, and was capable of understanding what he did, they should find that it was executed in a lucid interval, although a tendency may have existed to the recurrence of the delusion. This he also declined to do, confining that he had given such directions as were called for by the facts of the case, as appearing on the evidence.

The jury in a short time found a verdict for the defendant.

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Mr. *Bennett* and Mr. *Pigot* for the plaintiff in the cause, who was also plaintiff in the issue, moved for a new trial, on the ground of misdirection by the Judge, the admission of illegal evidence, and the discovery of new evidence. They cited *Ex parte Holyland*(a), in which Lord *Eldon* dissented from the proposition laid down by Lord *Thurlow*, in the *Attorney-General v. Parnter*(b); *Walcot v. Alleyn*(c); *M^r Adam v. Walker*(d); *Towart v. Sellars*(e); *Greenwood v. Greenwood*(f); *Cartwright v. Cartwright*(g); *Dew v. Clarke*(h).

Mr. Sergeant *Warren* and Mr. *Keller* for the defendant, relied on *Attorney-General v. Parnter*(i); *Brogden v. Brown*(j); *Wheeler v. Alderson*(k); *Hall v. Warren*(l).

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THE LORD CHANCELLOR :—

If it were necessary to decide some of the important questions argued at the bar in this case, I should take time to consider my judgment, and not dispose of the case at once. The motion is made on three distinct grounds: misdirection of the Judge; admission of improper evidence; and discovery of new evidence.

The objection as to the reception of improper evidence is, first, as to the admissibility of a certain memorial, of which the deed was not produced or accounted for. A satis-

(a) 11 Ves. 9.

(b) 3 B. C. C. 441.

(c) 1 Milward, 65.

(d) 1 Dow. P. C. 177-8.

(e) 5 Dow. P. C. 231, 245-6.

(f) 3 Curteis, Appx. 2. cited

13 Ves. 89. 3 B.C.C. 444.

(g) 1 Phill. 90.

(h) 3 Add. 79; 5 Russ. 163.

(i) 3 B. C. C. 441; 2 Hagg. 434.

(j) 2 Add. 441.

(k) 3 Hagg. 574.

(l) 9 Ves. 611.

answer has been given to that objection, viz.: that the produced was signed by the lunatic himself, prior to the execution of the instruments in question. The second of this objection is one of more weight; it is that made by this Court, in the matter of the lunacy, were made at the trial; which orders contained statements on which they were prejudicial to the plaintiff's case. It is clear that the statements, standing by themselves, ought not to have been submitted to the jury; but the Judge cautiously directed the jury to discharge from their minds all the statements appearing on the face of the orders; he did all in his power to prevent those statements from being received as evidence. I am not disposed to deny weight to that which was so strongly urged, that, notwithstanding such a direction by a Judge, a jury is likely to be influenced by the statements upon which the Court has acted by making the orders, and it would have been desirable that those statements should have been withheld from the jury; but I do not know that could be effected in any other way than was pursued in this case, if the reports themselves were produced in evidence. The reports were not received in evidence to show the acts of the lunatic subsequent to the execution of the instruments in question; therefore, I do not consider how far the subsequent acts of an alleged lunatic would operate upon his previous acts, to which value was sought to be given: but the reports were produced to show the acts of *Richard Creagh*, who had obtained the orders now sought to be supported,—to show what were his acts subsequent to the lunacy, as bearing upon those very orders, and I think they were properly admissible for that purpose.

For if he did acts and submitted to orders, the nature of which was to destroy or affect the validity of the orders, that was strong and proper evidence to go to the

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jury upon the question of the validity of the instruments themselves. The reports were also tendered to show that though the lunatic had been induced to execute previous leases of the property in question, inconsistent with each other, yet the Court itself had dealt with the property in the presence of *Richard Creagh*, as a property not subject to any of those leases. That also was proper to go to the jury, in order that they might draw from thence an inference as to the validity of the deeds in question. This disposes of the objection on the ground of the reception of improper evidence; but I may observe that if this case had wholly depended on that evidence, I am not sure that I might not have been induced to direct a further investigation, because of the weight which the jury may have given to the statements in the orders. But, in the view I have taken of this case, that question is not one of much importance.

[His Lordship then considered the third ground on which the application was founded; holding that a new trial ought not to be granted on that ground.]

Now as to the alleged misdirection of the Judge. If I had felt myself called on to decide the case upon principle, I certainly would have taken time to consider as to the facts. *Robert Creagh*, the lunatic, was insane previous to his marriage. The marriage itself is not impeached. It is not doubted that he again became insane some time after the marriage; and on the execution of the commission the jury carried back the lunacy to March, 1786. That finding of the jury is not, it is admitted, conclusive evidence against any person; but it is *prima facie* evidence; and, therefore, it throws upon the party disputing the insanity of *Robert Creagh* at any time within the period covered by

finding, the onus of proving his sanity at that period. Robert Creagh's insanity was what has been called in the law, partial insanity: that is, the insanity exhibited itself only on particular questions; but still he was insane, for his mind was not perfectly sound. For all common purposes of life he was as sane as any person in Court; but his mind was not, in itself, in a state of integrity; he had not complete power over his own mind. He was suffering under a delusion; one evidence of which was, that he believed persons were attempting to poison him. That might have had some foundation; it is possible that some person might have tempted to poison him: but the other branch of his delusion (for it is all one delusion) was one upon which he could not, if sane, have been mistaken. He believed himself to have been born in a way in which no person could have existed. Every moment of his existence must have satisfied him, had he been sane, that the notion as to the state of his stomach was a mere delusion; but every hour of every day he was under that delusion: his mind never rose superior to it, but, like all such delusions, it was for a time dormant: unless something occurred to present it to his mind, he was perfectly capable of business; but the witnesses say that, let that chord be struck—touch upon that topic—and at instant he was utterly incapable of, and refused to transact business. In this state of circumstances it is denied, on the one hand, that, for common purposes, not connected with that delusion, he was sane. It was asked whether a man labouring under partial insanity can be called sane; and the effect of partial insanity is to make a man wholly insane. There are few men who are wholly irrational; and there are numbers of persons subject to delusions, some under the care of this Court, who for all common purposes are perfectly sane; in some instances such persons have

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 and gone through all the common and social duties of life,
 without exhibiting symptoms of insanity, and yet were
 wholly incapable of doing any act to bind their property.

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A question was agitated before the learned Judge, at the trial, which would have put to the test the effect of partial insanity, more closely than it has been in any case with which I am acquainted. But the Judge, in his charge, avoided any real difficulty. He told the jury that, *prima facie*, the evidence of sanity at the time—of a lucid interval—was thrown upon the plaintiff. To that no objection has been made. He further told them that, in his opinion, “it was not necessary, in order to constitute a lucid interval, that the subject thereof should be restored to as vigorous, or as active a state of intellect as he may have enjoyed previous to his visitation with lunacy, but that they ought to be satisfied he was restored to a healthy state of mind, free from delusion, in order to warrant them in finding a lucid interval.” It is evident from this statement, that the Judge had in his mind what was stated by Lord *Thurlow*, and said by Lord *Eldon* in a later case; and that he agreed, as I do, with the distinction, which I am sure Lord *Thurlow* himself would have acquiesced in, though he laid down the rule generally,—that if a man has been insane, and afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to show that he was not as sound a man in his judgment as before his insanity. That is not reasonable, nor is that the legal rule. The mind may have been enfeebled by the attack; but if restored to reason, there is no standard by which his reason is to be measured. A weak mind may yet be a sound one.

All that the law requires is, that a man should have possession of his reason, so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect. The Judge put that very point to the jury: he says "that they ought to be satisfied that he was restored to a healthy state of mind, free from delusion, in order to warrant them in finding a lucid interval." I do not think this charge is open to the objection made: he does not tell the jury that they are to find that he was in as healthy a state of mind, free from delusion, as before; he uses the words generally. It is not as strong as if he had said that they should be satisfied that all delusion had passed away, and that no trace of it remained. He does not put it so strongly as he probably would have done, if he had meant that the existence of the delusion, even in an inactive state, but to which vitality might be given, would be sufficient to prevent his act from operating. I am not satisfied that, consistently with that charge, the jury might not have come to a conclusion in favour of the plaintiff.

On behalf of the plaintiff, his counsel put the case in two ways. Mr. *Bennett* objected that the Judge should have told the jury, "that although they believed *Robert Creagh* laboured under a delusion, yet they might believe he enjoyed a lucid interval, if they believed him rational in all other respects, except on the subject of the delusion." That was rather a difficult way of putting it to the jury; for the Judge was required to tell them that, though they believed that *Robert Creagh* laboured under delusion, yet they might come to the conclusion that he enjoyed a lucid interval, if he were rational in all other respects. The Judge could not give such a direction: it amounted to this; that, though *Robert Creagh* was at the time labouring under

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delusion, yet, if rational in all other respects, they find for the deeds. That would be to deny the existence of such a thing as partial insanity; and is in opposition to the authority, both legal and medical. It has been said that the test of a lucid interval is a voluntary confession of delusion.

Then Mr. *Pigot* called on the Judge to tell the jury that if they believed that any of the instruments mentioned in the issue were executed in an interval when *Robert Creagh* was not under the influence of delusion, and capable of understanding what he did, they should find that it was executed in a lucid interval, although a tendency may have existed to the recurrence of the delusion. The learned Judge really introduces this question, whether, with the morbid feeling existing at the time of the execution of the deed, the jury, being satisfied of that fact, are at liberty to find that, as *Robert Creagh* was reasonable in all other respects, his deed was valid. Bearing in mind that the delusion, the lurking mischief—was there, ready to be brought forward at the will of any person, yet the jury are called to find him to be sane and capable of doing the act in dispute. That is a question of the deepest importance, requiring great deliberation; for if it is to be laid down that a partial insanity is to affect all the acts of a man during his life, not connected with his delusion, where to all intents and purposes he is able to transact the common business of life, if, because there be a delusion which amounts to partial insanity, and, therefore, the man tried by that test is insane, all his solemn acts are to be defeated,—no Judge can deal hastily with so important a question. On the other hand, I dare not lay it down (and I have had much occasion to consider the question), if a man is partially insane

ereby, in point of law, he is altogether insane, and that partial insanity is never removed from his mind, but still exists there,—that he is capable of entering into solemn acts, which he would not have entered into if the subject of a delusion had been touched upon. The insanity may in such a case be exhibited at the volition of any person aware of the existence of the delusion. I will put the case of a man attempting to buy an estate of a person suffering under a delusion amounting to partial insanity. The whole contract might proceed regularly; the alleged insane person might make a fair bargain; the deeds might have been properly executed before proper witnesses; and yet the person dealing with the alleged lunatic, knowing of the existence of the delusion, might at any moment call it into action, and exhibit him, as an insane person, to the whole world. That a dangerous power to be possessed by any man, that he may, at his will, prevent the lunatic from dealing with any other person! Both judges and juries have always manifested a disposition to uphold the solemn acts of a man: and where there has been, as in the case of marriage, an irrevocable contract fairly entered into, and the parties appeared to be competent to do the act, and no actual delusion appeared at the time, there ought to be powerful evidence of insanity to defeat it: and, therefore, dangerous as his doctrine of partial insanity may be, it may not affect the interests of mankind to the extent apprehended. But the question for me to consider is, whether the Judge ought to have submitted the case to the jury in the way required by Mr. Pigot; and I think he was not obliged to do so: but I express only the impression on my mind, for I mean to dispose of this case on the facts, independently of the questions of law. If, on reviewing the facts, I am satisfied with the verdict, I shall not send the case to another jury.

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Now I hold that, as the acts of the parties are properly to be taken into consideration of the question whether the instruments were executed in a lucid interval, so it is incumbent on the party supporting the deed, to show clearly that it was executed during a lucid interval. I cannot receive the act itself in evidence to show that it was done in a lucid interval; a man may, while labouring under delusion or partial insanity, do a very reasonable act, and yet be incompetent to do that act in point of law. I must, therefore, have strong evidence of sanity at the time of the execution of these instruments. And there is this difficulty in the way of those who support the deeds. Suppose that a commission had been issued to inquire into the sanity of this person; and that, contemporaneously with his examination by the jury to ascertain the state of his mind, he had executed one of the deeds now in question, without exhibiting any marks of delusion, and yet, upon the jury interrogating him upon the subject of his delirium, they had found him labouring under it, would they not at once have brought in a verdict finding him to be insane; and would they not have rejected the idea that at the execution of the deed he had a lucid interval? The question, therefore, resolves itself into this: Whether, there being at the moment of the execution of the deed no exhibition of that which would be exhibited, if the delusion were then actually present to his mind, can the act be sustained? It would be difficult to support such a proposition.

THE LORD CHANCELLOR then reviewed the acts of *Robert Creagh* and of *Richard Creagh*; and came to the conclusion that there was not evidence to show that the instruments in question were executed by *Robert Creagh* during a lucid interval; that the instruments themselves showed that

y were not the acts of a man fully possessed of the knowledge of what he was doing; and that the facts of the case established that, at the times in question, *Robert Creagh* was a mere tool in the hands of *Richard Creagh*, and used him as such: and he refused the motion for a new trial, without costs, as the persons concerned in procuring the execution of the will and deeds were dead; and the plaintiff, who now relied on those instruments, might reasonably have supposed that they conferred title on him.

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BURROWES v. MOLLOY.

WILLIAM LOFTUS OTWAY, being possessed of several houses and gardens under a lease thereof to him made by the Hon. *S. Herbert*, for the term of sixty-one years, from the 25th March, 1832, at the yearly rent of 120*l.*, by an indenture of the 27th of March, 1833, in consideration of the sum of 250*l.*, charged them with an annuity or rent-charge of 30*l.*, payable to *Thomas O'Reilly* during his life. This deed contained a power to re-purchase the annuity upon payment of the sum of 250*l.* and all arrears, and giving three months' notice.

June 18.

Advances made by a mortgagee for the preservation of the estate (*ex gr.* head rent paid by him) follow the nature of the mortgage security: and if the mortgagee is not entitled to foreclose the mortgage until after the decease of mortgagor, neither is he entitled, during the life of the mortga-

ge, to a sale of the estate for payment of such advances: but if necessary, a receiver will be appointed to keep down the interest on the mortgage debt and advances.

The proviso for redemption in a mortgage of a leasehold for years was, that upon payment of the principal, on a day mentioned, and interest thereon, and the head rents in the meantime, the deed should be void. By deed of equal date, reciting that the agreement of the parties was, that the principal should not be called in until after the decease of the mortgagor, and that, by mistake, it was stated in the mortgage deed that the principal might be called in on a day certain, the mortgagee covenanted that the principal money should not be called in until after the decease of the mortgagor; anything in the deed of mortgage to the contrary notwithstanding.

Held,—That the mortgagee could not foreclose the mortgage during the life of the mortgagor, though the interest was in arrear, and the mortgagor had not paid the head rent.

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In July, 1836, *W. L. Otway* assigned the premises demised to him to *Arabella Lee*, for the residue of his term therein, subject to redemption upon payment of the sum of 500*l.*

By a post-nuptial settlement of the 2nd of January, 1837, *W. L. Otway* assigned his interest in the lease to two trustees, upon certain trusts, for the benefit of his wife and children.

After the execution of this settlement, the plaintiff, *Peter Burrowes*, married *Catherine*, one of the children of *W. L. Otway*.

W. L. Otway being indebted to *Peter Burrowes* in the sum of 900*l.* for money lent, by indenture of mortgage of the 1st of June, 1841, made between himself of the one part, and *Peter Burrowes* of the other part, assigned the houses and premises demised by the lease of 1832, to him, for the residue of the term of sixty-one years; subject to a proviso, that if *W. L. Otway*, his executors, &c., should pay to *Peter Burrowes*, his executors, &c., the sum of 900*l.* on the 1st of May, 1842, together with interest thereon, in the mean time, at the rate of 3*l.* 10*s.* per cent. per annum, on every 1st of May and 1st of November in each year, and should, in the mean time, pay the yearly rent, and perform the covenants in the lease of the said lands, which were on the part of the lessee to be paid and performed, then the indenture and bond collateral therewith should be void.

By another indenture of equal date, and made between *Peter Burrowes* of the one part, and *W. L. Otway* of the

part; after reciting the mortgage of equal date, and upon the treaty for that mortgage it was stipulated and agreed on, that the principal sum secured by it should not be called in until after the decease of *W. L. Otway*, but that by mistake it was stated in the deed of mortgage, that the principal sum of 900*l.* might be called in after the 1st of January, 1842; and that *Peter Burrowes*, in order to correct the error, and to carry the original intention of the parties into execution, proposed to execute a deed of covenant, extending the time of redemption to the day of the decease of *L. Otway*, as originally agreed on; it was witnessed by *Peter Burrowes*, for himself, his executors, administrators, and assigns, covenanted with *W. L. Otway*, his executors, &c., that the principal sum of 900*l.*, or any part thereof, should not be called in until after the decease of *L. Otway*, anything in the deed of mortgage or bond or other instrument therewith, to the contrary in anywise notwithstanding.

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In October, 1841, *W. L. Otway* granted an annuity of 50*l.* to *Thomas Keller*, his attorney, and charged the same upon the premises demised by the lease: and on the 16th of January, 1843, he executed his bond and warrant of attorney confess judgment thereon to the plaintiff, *Peter Burrowes*, for the penal sum of 480*l.*, conditioned for the payment of 50*l.*, with interest at 6*l.* per cent. per annum; on which judgment was entered as of Easter Term, 1843.

On the day after the execution of this bond, *W. L. Otway* was arrested for debt; and was afterwards discharged as an insolvent debtor, having previously executed an assignment of all his estate and effects to *J. S. Molloy*, the Provisional Assignee. At the time of his arrest, a large arrear

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of the head rent of the mortgaged premises was due to the Hon. *S. Herbert*, who commenced legal proceedings for the recovery thereof. *Peter Burrowes*, in order to save the interest under the lease from eviction, on the 15th November, 1843, paid to the Hon. *S. Herbert* the sum of 387*l.* 10*s.* for rent up to the 29th September, 1843, and 3*l.* 3*s.* 6*d.* for costs. *O'Reilly*, the prior annuitant, also filed a bill to raise the arrears of his annuity; and *Peter Burrowes*, to prevent further litigation and expenses to the estate, paid him 30*l.*, being the arrears due to him up to September 1843, together with 17*l.* 16*s.* 10*d.* for costs.

The bill was filed by *Peter Burrowes*, praying that an account might be taken of the sum due to him on foot of his mortgage and judgments, and for his advances for arrears of head rent, annuity, and costs; and that the money so advanced by him in discharge of the arrears of head rent, and the interest thereof, might be declared to be a valid charge on the premises, in priority to all charges and incumbrances affecting the premises; and that he might be declared entitled to add the sums paid by him for the arrears of the annuity, and costs, to his other demands; and that the indenture of the 2nd January, 1837, might be declared fraudulent and void against the plaintiff; and for payment of the moneys to be found due to the plaintiff on the taking of an account; and in default, a foreclosure and sale; and that the plaintiff might be at liberty to redeem the mortgage on the 1st July, 1836, and, if necessary, to re-purchase the annuity of the 27th of March, 1833: and for a receiver.

At the time of filing this bill there was due to the plaintiff, on foot of the mortgage of 1841, the principal sum of 900*l.*, and a small arrear of interest on account of the late

year's gale thereof, which became due next before the filing of the bill.

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O'Reilly, by his answer, denied the right of the plaintiff to be paid the sum advanced by him for head rent, in priority to his annuity; as it had been paid without his privity or consent.

Keller insisted that, by reason of the deed of covenant, the plaintiff was not entitled to foreclose his mortgage until after the decease of *W. L. Otway*; and that his right to relief, on foot of the advances made by him, followed the nature of his title to the mortgage.

Mr. Sergeant *Warren*, Mr. *Brooke*, and Mr. *Bowen*, for the plaintiff: *Gladwyn v. Hitchman*(a); *Stanhope v. Mansfield*(b).

Argument.

Mr. *Pigot* and Mr. *Maley* for the defendant, *Keller*, cited *Bonham v. Newcomb*(c); *Lawless v. Mansfield*(d); *Ramsbottom v. Wallis*(e).

Mr. *Close* for the defendant, *O'Reilly*.

Mr. *R. Warren* for other parties.

(a) 2 Vern. 135.

(d) 1 Dru. & War. 557.

(b) 2 Eden, 197.

(e) Coote on Mortgages, App.

(c) 1 Vern. 232.

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THE LORD CHANCELLOR :—

In this case, the mortgage under which the plaintiff claims bears date the 1st of June, 1841, and is in the common form, providing that upon the payment of the sum of 900*l.* on the 1st of May, 1842, with interest thereon, in the mean time, on every 1st of May and 1st of November, and upon payment in the mean time of the yearly rent, and performance of the covenants in the lease, the mortgage should be void ; but by a deed of even date therewith, it appears that the agreement between the parties was, that the principal sum should not be called for until after the decease of the mortgagor. This deed recited, that by mistake it had been stated in the deed of mortgage that the principal sum might be called in upon the 1st of May, 1842 ; and that the parties to it were willing to correct that mistake, and to carry their original intention into execution ; and that the mortgagee had proposed to execute a deed of covenant enlarging the time of redemption to the day of the decease of the mortgagor, as originally agreed upon : and then the mortgagee covenanted with the mortgagor, that the principal sum of 900*l.* should not be called in until after the decease of *William Loftus Otway*, the mortgagor, anything in the deed or bond to the contrary in anywise notwithstanding.

Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the mean time, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure ; because his right became absolute at law

nonpayment of the interest, the estate having been subject to a condition which had not been fulfilled. If the agreement was different; for although by the mortgage it was stipulated that the principal sum be repaid on the 1st of May, 1842, in the ordinary way yet from the deed of covenant it appears that the agreement between the parties was, that the principal should not be called in until after the decease of the mortgagor; and there is an actual covenant by the mortgagor that he will not call in the principal money during the life-time of the mortgagor, which is not qualified by any condition respecting the payment of the interest in the life-time, or of the rent reserved by the lease. This transaction assumed a different shape with respect to the payment of the principal and the payment of the interest; it was only in case of the non-payment of the principal sum, after the decease of the mortgagor, that the mortgagee was to have a right to foreclose. Interest was to be paid half-yearly upon the principal; and after the decease of the mortgagor any default in the payment of the interest would enable the mortgagee to execute his bill of foreclosure, because the condition would have been broken: but the covenant is independent of anything contained in the deed of mortgage; and is, in fact, an absolute covenant, that, notwithstanding anything contained in the mortgage deed, the mortgagee shall not call in the principal money during the life-time of the mortgagor. I do not see how any default in the payment of the interest, during the life-time of the mortgagor, could enable the mortgagee to commit a breach of his covenant.

It was said that this was like a case where, although the principal money was by the proviso for redemption to be paid at a certain period, yet the mortgagee covenants that he will not call in the principal for a longer period, unless default be made in the payment of the interest in the mean

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time; but the parties here have not entered into such arrangement. I think, therefore, that under these instruments the plaintiff was not at liberty to file his bill for foreclosure, as far as relates to the principal money; therefore cannot do so in respect of the interest which accrued before the principal sum became payable.

Then comes the question, whether, on account of his vague claims, the plaintiff is entitled to file this bill. authority has been cited in support of this claim; and I am of opinion that he could not file such a bill as a mere sale creditor: for, if claiming as a mortgagee, he cannot, during the life-time of the mortgagor, file a bill to foreclose; neither can he, by making advances arising out of his character as a mortgagee, entitle himself to maintain a suit which he cannot maintain in his original character of mortgagee. This is settled by the case of *Ramsbottom v. Wallis*(a), which has been referred to, where a second mortgagee, having covenanted not to foreclose his mortgage for ten years, purchased up the first mortgage, and then sought to foreclose; and it was held that he could not file his bill to foreclose the mortgage. Whatever might be the priority of his claim, he could not enforce that claim by reason of his covenant.

These observations refer to the defence set up by Mr. Keller: but as to Mr. O'Reilly, the plaintiff must submit to re-purchase the annuity granted to him, or have his bill dismissed as against him. A party has no right to file a bill against a person having an existing annuity, unless he has rights prior to the annuitant. If the plaintiff choose to purchase the annuity from O'Reilly, he is at liberty to do so. He may offer to re-purchase the annuity, but he cannot file

(a) Coote on Mortgages, App. 704.

a bill against him without such an offer on his part. Instead of so doing, the plaintiff has filed this bill, and now declines to re-purchase the annuity.

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There is some difficulty in this case ; but I think the plaintiff is entitled to a receiver. I do not see what right Mr. *Keller* has to prevent it ; for he cannot contend that the plaintiff's interest on the principal sum ought not to be kept down. I regret that I cannot grant the relief sought, for this is a hard case, the deed of covenant having been prepared by Mr. *Keller* himself.

GREEN v. GREEN.

June 18, 20.

GODFREY GREEN, being seised of the lands of Green Hills, under a lease for three lives, with a covenant

Testator devised lands to P., upon trust to convey them to his three

sons, in such shares as P. should appoint ; and in default of appointment he gave the lands to them equally as tenants in common. In 1786 P., in execution of the trust, conveyed part of the lands to the use that in case S. (one of the sons) should marry with the consent of P. first obtained, but not otherwise, such woman or women as he should so marry, in case she should survive him, should, during her life, receive for jointure such annuity (not exceeding a certain sum), as S. should appoint ; and to the further use, in case S. should marry with such consent, but not otherwise, that he might, by deed or will, charge the lands with 500*l.* for portions for his younger children, payable in such shares as he should appoint.

In 1788 S. married with consent ; and, reciting his power, covenanted that the trustees of his settlement, in case there should be one or more younger children of the marriage living at his death, should raise 500*l.* out of the lands ; said sum to be divided in such shares and proportions, amongst such younger children, as he should by will appoint ; and for want of appointment, equally.

There was issue of this marriage three younger children.

S., after the death of P., married a second wife, and charged the lands with an annuity for her jointure ; and died leaving his wife and four children of his second marriage, and the three younger children of his first marriage, surviving. By his will, in 1842, he appointed one shilling to each of the children of the first marriage, and the residue among the children of the second marriage.

Held.—Upon the construction of the settlement of 1786 and the circumstances, that the consent of P. was only requisite to any marriage of S. which should take place in his lifetime ; and that the children of the second marriage were objects of the power.

2. That the settlement of 1788 amounted to a contract, that so far as S. could bind his power, the children of the first marriage should take the fund equally between them, if he did not otherwise apportion it amongst them ; that upon there being issue of the second marriage, S.'s power of appointment was gone ; and that the children of both marriages were entitled to the fund equally between them, as one class.

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for the perpetual renewal thereof, devised them by his will, which bore date in October, 1777, to *Francis Green* and *Caleb Powel*, and the survivor of them, and the heirs and assigns of such survivor, upon trust that they, or the survivor of them, should in his or their discretion convey them to his three sons, *Godfrey Green*, *Samuel B. Green*, and *John Green*, in such shares and proportions, for such estates, whether in fee, fee tail or for life, with remainder to their respective issues, and subject to such powers, conditions and limitations as the trustees, or the survivor of them, should by deed or deeds limit or appoint; and for want of such appointment, he directed that his said sons should have, hold and enjoy the lands, share and share alike, to them and their respective heirs, as tenants in common: and died shortly afterwards.

Francis Green, one of the trustees, died in 1782; and disputes having arisen relative to the mode in which the trusts of the will should be carried into execution, a bill was filed by *Caleb Powell* for the purpose: but all the parties being competent to compromise the suit, an arrangement was entered into, which was carried into effect by an indenture dated the 20th of November, 1786, and made between *Godfrey Green* of the first part; *John Green* of the second part; *Samuel Green* of the third part; *John O'Brien* and *Elizabeth*, his wife, and *Edmund Prendergast* and *Mary*, his wife, who were annuitants named in the will of *Godfrey Green*, of the fourth part; *Caleb Powell* of the fifth part; *Simon Purdon* and *Samuel Dixon* of the sixth part; and *Robert Powell* and *Benjamin Friend* of the seventh part: whereby it was witnessed that, in pursuance and execution of the trusts of the will, *Caleb Powell*, together with *Godfrey Green*, *John Green*, and *Samuel Green*, according to their several and respective estates and

interests therein, granted and released the said lands of Green Hills, and all their estates and interests therein, unto *Simon Purdon* and *Samuel Dixon*, and the survivor of them, his heirs and assigns, for the lives of the *cestuis que vie* named in the existing lease of the lands, and the life of every other person who should be added thereto, pursuant to the covenant for perpetual renewal thereof: to hold that part of the lands called the House Division, chargeable with the entire head rent payable out of the entire of the lands, and subject to one-third part of the renewal fines, to the use of the trustees for a term of 100 years; and, subject thereto, to the use of *Samuel Green* and his assigns for his life; and after the determination of that estate, to the use of trustees and their heirs during his life, upon trust to preserve, &c.; and from and after the decease of *Samuel Green*, then to the use, intent, and purpose, in case he, the said *Samuel Green*, should marry with the consent and approbation of the said *Caleb Powell* first had and obtained in writing, but not otherwise, that such woman or women as he should marry, in case she should happen to survive him, should, during her natural life, take and receive, for and in the name of jointure, such annuity (not exceeding the rate of £100 for each 100£ as he, the said *Samuel*, should actually receive as a portion with such woman or women) he should by deed appoint; with power to distrain for the same. And to the further use, intent, and purpose, in case the said *Samuel Green* should marry with such consent and approbation as aforesaid, but not otherwise, that he should might, by any deed to be by him executed, or by his last will and testament, charge and incumber the said part of the said lands, so to him limited for life, with any sum not exceeding the sum of 500£. as and for the portions and provisions for his younger children lawfully to be begotten; and

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to be payable at such times and in such shares and proportions as he should by said deed or will limit and appoint: and subject thereto, in case the said *Samuel Green* should marry with such consent as aforesaid, then to the use of the first and other sons of *Samuel Green* by his said wife, *quasi* in tail male; with remainder to the daughters of the marriage in tail general; with divers remainders over: and the deed contained similar limitations of other parts of the lands to the other sons of the testator and their issue. Upon the execution of this deed *Samuel Green* entered into possession of the part of the lands limited to him.

In 1788 *Samuel Green* married Miss *Anna Maria Young*, having previously obtained the written consent of *Caleb Powell* thereto; and in contemplation of that marriage, a settlement of the 4th of October, 1788, was made between *Samuel Green* of the first part; *Anna M. Young* of the second part; *Caleb Powell* of the third part; and *Robert Young* of the fourth part; whereby, after reciting, amongst other things, the will of *Godfrey Green*, and the indenture of November, 1786, it was witnessed, that in consideration of 600*l.*, the marriage portion of *Anna Maria Young*, and for the purpose of settling and securing the sum of 500*l.* for the younger children of him the said *Samuel Green*, on the body of *Anna M. Young*, out of his the said *Samuel Green's* division or share of the lands of Green Hills, under or by virtue of the several powers given unto him by the will of *Godfrey Green*, and by the indenture of the 20th of September, 1786; he the said *Samuel Green*, for himself, his heirs, executors, and administrators, covenanted with *Caleb Powell* and *Robert Young*, their heirs and assigns, that in case the said intended marriage should take place, the share or division of the lands of Green Hills, known by the name

the House Division, should be settled and assured, subject jointure of 48*l.* per annum for *Anna Maria Young*, to use of the first son of *Samuel Green* on the body of a *M. Young* lawfully to be begotten, and his heirs ; with divers limitations over : and further, that they, said *Caleb Powell* and *Robert Young*, or the survivor of them, or the executors or administrators of such survivor, in case there should be one or more younger child or children of the body of *Samuel Green* on the body of *Anna Maria Young* begotten, living at the time of the death of *Samuel Green*, should raise and levy the full sum of 500*l.* sterling, of the rents, issues, and profits which should be issuing payable out of the said House Division of the lands of the said Hills, over and above the jointure thereby provided for *Anna Maria Young*, and without prejudice to the same ; the said sum of 500*l.* to be divided in such shares and proportions amongst such younger children, if more than one, in such manner, as *Samuel Green* should by his last will and testament appoint and direct ; and in case there should be only one younger child at the time of the death of *Samuel Green*, the said sum of 500*l.* to go and become the property of such younger child ; and for want of such appointment, that then and in such case the said sum of 500*l.*, if there were more than one younger child, should go in gavelkind amongst such younger children, to be paid to them at twenty-one years of age : and in case there should be but one younger child by the then intended marriage, that then the said sum of 500*l.* should become the property of the said younger son or daughter, payable at the time therein mentioned.

There was issue of that marriage three children, viz. : *Samuel Green*, and the defendants, *Anna Maria Young*, *Elizabeth Green*, and *Sarah Young*, otherwise *Green*.

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Anna Maria Green having died, *Samuel Green*, in the year 1815 (*Caleb Powell* being then dead), married *Frances Moffett*; and, upon that occasion, he received a fortune of 800*l.* with his wife. There was issue of that marriage five children, viz.: the plaintiffs, *Samuel, John, Eliza, Alicia*, and *Frances Green*.

In 1839, *Godfrey Green*, the younger, died intestate, leaving *Robert Young Green* his eldest son and heir-at-law.

In 1841 *Samuel Green* executed a post-nuptial settlement, whereby, in consideration of her fortune of 800*l.*, he charged his portion of the lands with a jointure of 64*l.* per annum for his wife, *Frances*, during her life, in case she should survive him.

Samuel Green died in February, 1844, having made his will, dated the 2nd November, 1842, whereby, after reciting the indenture of the 20th of September, 1786, and his power to charge the lands with portions for his younger children, he charged and encumbered that portion of the lands called the House Quarter with the sum of 500*l.* late currency, for portions and provisions for his younger children; and he bequeathed the same to and amongst such younger children in the manner following, that is to say, to his eldest daughter, *Anna Maria Young*, one shilling; to his daughter, *Sarah Young*, one shilling; to his son, *Samuel Green*, one shilling; to his daughter, *Eliza Green*, 150*l.* sterling; to his daughter, *Alicia Green*, 100*l.*; to his daughter, *Frances Green*, 200*l.*; and to his son, *John Green*, 11*l.* 7*s.* 9*d.*

It was admitted that the defendants, *Anna Maria Young* and *Sarah Young* (who had married in the life-time of their father), had not received any portion or fortune on the occasion of their respective marriages, and that they did not at any time receive any sum of money by way of advancement in life, from their father.

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The bill was filed by the children of the second marriage against *Robert Young Green*, the younger children of the first marriage, and the widow of *Samuel Green*, for an account of the sum due on foot of the charge of 500*l.* so bequeathed by the will; and that whatever should be found due upon the taking of that account might be paid to the parties entitled, by *Robert Young Green*; or, in default, a decree.

Mr. Sergeant *Warren*, Mr. *Moore*, and Mr. *Billing*, for the plaintiffs. Argument.

The power of appointment contained in the settlement of 1786 is not confined to the younger children of the first marriage, but extends to the children of any future marriage: *Burrell v. Crutchley*(a); *Braithwaite v. Braithwaite*(b); *Butcher v. Butcher*(c). The appointment by the settlement of 1788 is therefore void, having been executed in favour of some of the objects of the power only; and it is not competent for the donee of the power to re-execute it: *Lervey v. Hervey*(d); *Edwards v. Slater*(e). Mr. *Powell's* consent to the first marriage was sufficient to satisfy the condition required by the deed of 1786: *Hutcheson v. Hammond*(f).

(a) 15 Ves. 544.

(d) 1 Atk. 561.

(b) 1 Vern. 334.

(e) Hard. 410.

(c) 1 Ves. & Bea. 79.

(f) 3 Bro. C. C. 281.

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Argument.

Mr. Moore, Mr. Brooke, Mr. E. Pennafather, and
R. P. Lloyd, for the younger children of the first marriage

The language of the will in *Burrell v. Crutchley* stronger than in the present case. But supposing that the children of *Samuel Green* were objects of the power, and that the appointment by the settlement of 1788 can be supported *in omnibus*; yet as that settlement indicated an intention to provide for the children of the first marriage it was not competent for *Samuel Green* afterwards to deprive them of all provision under the power. They were entitled to, at least, an equal share of the 500*l.*, considering them as some of the class for whom the provision was intended: *West v. Bernie*(a). In *Braddish v. Braddish* in a case like the present, it was held, that the second marriage was a fraud upon the children of the first marriage. We submit, however, that the children of the second marriage are not the objects of the power; for that marriage was had without the consent of the trustee; and that consent was a condition precedent to the exercise of the power: *Mansell v. Mansell*(c); *Sympson v. Hornsbury*. Nor did the death of the trustee before the second marriage took place, alter the position of *Samuel Green*: *Dunlop v. Annis*(e); *Frankelen's Case*(f).

Mr. Martley and Mr. Owen for Robert Young Green

Mr. Monahan and Mr. Charles Shaw for the wife of *Samuel Green*.

Mr. Moore in reply.

(a) 1 R. & M. 431; 1 Sugd. Pow. 99; 7th Ed.
(b) 2 Ball & Bea. 479.
(c) Wilmot's Notes, 36.

(d) Prec. in Ch. 452.
(e) Dyer, 219. pl. 8.
(f) Moore. 62 pl. 172.

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—
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DEED CHANCELLOR :—

question in this case is as to the rights of the plain-
e children of the second marriage. The case is
ome difficulty, and arises out of the will of *God-*
reen, by which the property was given to trust-
th the unusual power, at their discretion, to convey
; three sons of the testator, in such shares and for
ates, and subject to such powers, conditions, and
ons, as they or the survivor of them should think
and in default of appointment to his sons in fee, as
in common.

onsequence of a dispute relative to the disposition of
tes, a suit was instituted by one of the trustees, to
e trusts of the will into execution. That suit was
mised ; and the property was divided into three por-
and the surviving trustee (the other having previously
ogether with the three sons, conveyed the property
se, as to each separate portion of it, of one of the
: his life ; and after his decease, in case he should
with the consent of the trustee (*Mr. Powell*) first ob-
in writing, but not otherwise, that such woman or
as he should marry, in case she should happen to sur-
n, should yearly during her life receive, in the name
ure, such annuity, not exceeding the rate of 8*l.* by
l. for each 100*l.* as he should actually receive as a
with such woman or women, as he should by deed
: and further, in case he should marry with such
as aforesaid, but not otherwise, that he should and
by deed or will, charge and incumber the part of the
to him limited for life, with any sum not exceeding
and for a provision for his younger children ; and

under two brothers and their issue, with precise limitations. The same uses were declared resp shares of each of the other brothers, with the same requiring consent to marriage.

Upon the first marriage of *Samuel*, which was the consent of Mr. *Powell*, a settlement was whereby he covenanted to settle a jointure upon his wife ; and also that the trustees, in case there should be one or more younger child or children of the marriage, should, at his death, should raise and levy the sum of 500*l*. out of the rents and profits which should be issued out of the lands, over and above the jointure thereby provided, which sum of 500*l*. was to be divided in such shares and portions, amongst such younger children, and in such manner, as he should by will appoint ; and in default of appointment, the said sum of 500*l*. was to go in equal shares amongst such younger children.

Afterwards, the Act of Parliament for which the Bill was spon- sible was passed ; which did not give power to the appointor, in cases like the present, to exclude younger children ; but enabled him to give any sum which

ment of the trustee, who had died previously. The donee of the power has executed it by giving but one shilling to each of the children of his first marriage; and has appointed the bulk of the fund to the children of his second marriage.

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The first question which arises is, whether the obtaining of the consent of the trustee to his first marriage was a sufficient compliance with the condition. I am of opinion that it would not be sufficient in this case, if the trustee had been living at the period of the second marriage: particularly as regards the widow; for it was expressly declared that in case he should marry with the consent of the trustee, *but not otherwise*, his wife should have the jointure. It is an express declaration, that none shall have the jointure but the woman whom he shall marry with the consent of the trustee. This altogether distinguishes the case from that of *Hitcheson v. Hammond*, and shows that the consent of the trustee to the first marriage did not render it unnecessary to obtain his consent to the second marriage. But here the question is different: Mr. *Powell* died before the second marriage; and the question is, whether his death, which rendered his consent unattainable, created an insuperable bar to the exercise of the power in case *Samuel* should marry again. *Mansell v. Mansell*(a) was relied upon as an authority against this being held to be a good execution of the power: but I am of opinion that that case is also distinguishable from the present; for there the Court saw an intention that the power should not be exercised without the consent required, and accordingly held that there was a breach of the condition, because the consent might have been obtained if the party had thought proper to give it.

(a) *Wilmot's Notes*, 36.

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Upon the construction of the settlement I am of opinion, that all that was intended by the clause was, that Mr. *Powell* personally, during his life-time, should have control over the marriage of the sons; and that consent having by Mr. *Powell's* death, been rendered unattainable, this marriage, although without the consent of Mr. *Powell*, was such a marriage as to make the issue of it objects of the power.

In coming to this conclusion, it is certainly very difficult to get over the words of the settlement respecting the power of jointuring; which limit the jointure "to such woman or women as he should so marry," that is, marry with consent; but as I think the intention of the parties was, that the obligation to obtain the consent should be imposed only during the life-time of the party competent to give such consent, I shall struggle with these technical terms, so as to effectuate the intention of the parties. The limitations in the will of *Godfrey Green* justify this view; for under it, in default of appointment by the trustees, the three sons took the estate as tenants in common in *quasi* fee: if, therefore, the trustees in the settlement of 1786 had died before the marriage of any of the sons, as their consent would in that case have been unattainable, the settlement would have been defeated, and the sons must have fallen back upon the limitations in their father's will. Upon the whole case, therefore, I am of opinion, that the want of the consent of the trustee did not, under the circumstances, prevent the exercise of the power by the donee in favour of the children of the second marriage; for I am bound to follow Lord *Eldon* in *Burrell v. Crutchley*, and to hold that the power did include all the children, as well those of the second as of the first marriage.

By the settlement executed upon the first marriage that

power was exercised in favour of the younger children of that marriage exclusively. This might have been a good execution of the power. It was not void upon the face of it; for the appointor might not have married again, or even if he did, he might not have had any children of the second marriage, who would be objects of the power. If he had not married again, the power would have been properly executed; for this settlement would, in that case, have included all his younger children. This, therefore, was not a bad execution of the power at the time when it was made; although it would become so, if there were any children of the second marriage; and such having been the case, it has become informal. Now, I quite agree in the proposition, that if a man execute a power imperfectly, and that there is nothing to prevent a further execution of the power by him, he may execute it again in a valid manner. The appointor, therefore, still possessed the ability to execute the power; and accordingly he executed it by his will. But then the question arises, could he execute it so as wholly to defeat the claims of the children of the first marriage under their settlement, and to let in the children of the second marriage exclusively.

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There is no doubt upon the authorities, that a man having a power, may bind himself not to execute it, save subject to particular restrictions and conditions. He may release it altogether; or covenant to execute it in a particular manner; and the Court will give effect to such a covenant. Where the donee of the power restricts and limits himself in the execution of it, he must execute it accordingly, or not at all. In this case the donee of the power appointed the entire fund to the younger children of the first marriage, but reserved to himself the power of apportioning it amongst

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them as he thought proper. The second marriage put an end to the power of apportionment. The money was to be raised as before, but the donee could not apportion the fund exclusively amongst the younger children of the first marriage; for the children of the second marriage had become entitled to a share of it. But in default of appointment the children of the first marriage were to take the fund equally. Is not that in effect a contract by him, that, so far as he can bind his power, the children of the first marriage shall take the fund equally between them; and is he at liberty, by his own voluntary act, to defeat the provision made for them? I am of opinion he had no such power: he bound himself to give effect to the provision in favour of the children of the first marriage, and could not, by a voluntary disposition, defeat the provision which by a solemn deed he had made for them.

I consider the execution of the power by the first settlement as still operative; and if operative, the donee could not defeat the interest of the children of the first marriage under it, as between themselves and the children of the second marriage, taking in default of any execution of the power. There is some difficulty in the matter; but the conclusion to which I have come is, that the children of the first and second marriages take the fund equally between them as children of one class. I think that, within the authorities (not meaning to strain the rule, but to carry into effect the intention of the parties), I am at liberty to hold that the 500*l.* belongs to the children of both marriages. I shall therefore declare that, in the events which have happened, all the children of both marriages are entitled, as the younger children of their father, in equal shares; and that the plaintiffs are entitled to their portion accordingly. The

sts of all parties must come out of the fund ; and let the widow be at liberty to go before the Master to establish (if he can) her right to the annuity she claims ; she must pay her own costs of that reference. The expense of raising the money must be borne by the estate.

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Extract from the Decree.—Declare that the younger children of the first marriage, and all the children of the second marriage, take the sum of 500*l.* in the pleadings mentioned, between them, as one class ; and that the plaintiffs in the cause are entitled, in the events which have happened, and under the instruments which have been executed, to their portions of the said sum of 500*l.* accordingly. Let the expense, if any, of raising said monies, be borne out of the estate, and let the costs of all parties to this cause be paid out of the fund. Declare that the defendant, *Frances Green*, otherwise *Moffat*, having married *Samuel Green*, deceased, in the pleadings mentioned, after the death of *Caleb Powell*, in the pleadings named, his consent to the said marriage was not necessary to enable the said *Samuel Green* to charge his portion of the lands in the pleadings mentioned with a jointure for the said *Frances Green* : and let the said *Frances Green* be at liberty to go before the Master and establish her right to the jointure in her answer in this cause mentioned ; and if she should establish it, declare that she is entitled to have the same provided for her out of the lands.

Decree.

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ALLEYNE v. ALLEYNE.

June 21.

S., entitled to a lease for lives, by lease and release of the 5th of March, 1833, in consideration of love and affection for his eldest son, *J.*, and in order to advance him in life, and to entitle him to a wife and fortune "now in contemplation," conveyed the lands to *J.* and his heirs.

This deed was executed by *S.* and *J.*, and was registered by *S.* nine months afterwards: but *S.* retained it in his possession; and, with the assent of the son, continued to his death to act as owner of the lands.

S., by his will, devised all such real, freehold, and per-

sonal property of which he should die seised or possessed, to *J.*, "in case he shall recover from his present illness;" and appointed *E.* his residuary legatee.

There was no particular marriage in contemplation when the conveyance of 1833 was executed. *J.* survived the testator, and afterwards died of the illness with which he was afflicted when the testator made his will.

Held.—1. That the conveyance of 1833 was not conditional, executed for a specific purpose which had not been performed; and that on its execution the legal estate was vested in *J.*

2. That estate was not divested by the son not afterwards marrying.

3. That the circumstances of the case did not establish a trust for *S.*

Semble.—That the true construction of the devise to *J.* is,—that it is a gift to him, in case he did not die from his then present illness in the life-time of the testator.

BY indenture of lease, of the 14th of April, 1779, the lands of Coolprivane were demised to *John Alleyne*, the elder, and his heirs, for a term of three lives; with a covenant for renewal for two other lives, upon the decease of the survivor of the three lives.

Some time in the year 1798, *John Alleyne*, the lessee, died intestate, leaving *Samuel Alleyne*, his eldest son and heir at law; who, thereupon, became entitled to the lessee's interest in the lease of 1779.

By indenture of the 24th of September, 1800, executed in contemplation of his marriage with Miss *Ellen Scully*, *Samuel Alleyne* conveyed the lands of Coolprivane to the use of himself for life; remainder upon trust to secure a jointure for his intended wife during her life; with remainder upon trust to raise 1500*l.* for the use of the issue of the marriage, as he should appoint; and in default of appointment equally: and after the decease of *Ellen Scully*, and the performance of the trusts therein mentioned (all of which had determined or become incapable of taking effect, save

rust for raising the 1500*l.*) to the use of *Samuel Alleyne*, his heirs and assigns, for ever.

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ere was issue of the marriage three children, namely, *Alleyne*, the eldest son; *William Alleyne*, and *Ellen Alleyne*.

indenture of lease and release, dated the 5th of March, made between *Samuel Alleyne* of the first part, and *Alleyne*, therein described as his eldest son, of the second part; after reciting that *Samuel Alleyne* was seised possessed of the lands of Coolprivane, under the lease 9, he, in consideration of his natural love and affection son *John*, party thereto, and in order to advance him, and to entitle him to a wife and fortune "(now in continuation)," and also in consideration of 10*s.*, granted and sold unto *John Alleyne* the lands of Coolprivane; to the use and benefit of renewal therein, to and to the sole and separate use of *John Alleyne*, his heirs and assigns, for ever; subject to the yearly rent reserved and payable thereout.

as deed was executed by both the parties to it, and its signing, sealing, and delivery by them was attested by two witnesses. It was wholly in the handwriting of *Samuel Alleyne*, who was an attorney; and was, on the 31st of December, 1833, duly registered by his direction and upon a memorial executed by him. *Ellen*, the wife of *Samuel Alleyne*, died in his life-time.

In the year 1831 *William Alleyne*, the second son of *Samuel Alleyne*, married: he died in the year 1836, leaving *Sa-*

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muel Alleyne the younger, the plaintiff in this cause, his only son and heir at law.

Notwithstanding the deed of 1833, *Samuel Alleyne*, the elder, continued in possession of the lands of Coolprivane, and received the rents thereof, save some small sums which *John Alleyne* received from the tenants, and which were afterwards allowed them by *Samuel Alleyne* as payments on account of their rents. In 1834, *Samuel Alleyne* alone executed a power of attorney to one *Timothy Casey*, to enable him to collect the rents; and in 1839 he accepted proposals for the letting of part of the lands, some of which were witnessed by *John Alleyne*, and others were entirely in his handwriting.

In October, 1841, *Samuel Alleyne* died, having previously made his will, whereby he gave and devised all such real, freehold, and personal property of which he should die seised or possessed or entitled unto, in any right or by any means whatsoever, unto his son, *John Alleyne*, "in case he shall recover from his present illness," charged with an annuity of 20*l.* sterling to be applied towards the maintenance and education of his grand-son, *Samuel Alleyne*, until he should attain the age of twenty-one years; and to be paid by two half-yearly payments, on every first day of May and first day of November in each year; with full power to his executors to distrain for the same in case of the non-payment thereof. And he intrusted the care and guardianship of his said grandson unto his daughter, *Ellen Alleyne*, "who I hereby appoint my residuary legatee. I recommend her, in case she shall marry, to have such property as I leave her settled on herself, without the control or intermeddling of any husband with whom she shall

marry; and her own receipts alone to pass for the same." After some pecuniary bequests, he appointed two executors, who having renounced probate, letters of administration with the will annexed were granted to *Ellen Alleyne*.

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Upon the death of *Samuel Alleyne*, *John Alleyne* entered into possession and receipt of the rents of the lands, and continued until June, 1842, when he died intestate and without ever having been married, leaving *Samuel Alleyne*, the plaintiff, his nephew and heir at law, and also the heir at law of *Samuel Alleyne*, the testator, him surviving. Upon the death of *John Alleyne*, *Ellen Alleyne* entered into possession of the lands of Coolprivane, claiming to be entitled to them under the residuary bequest in the will of *Samuel Alleyne*: and as he had been the last life named in the lease of 1779, *Ellen Alleyne*, in the month of July, 1842, applied to and procured a renewal thereof from the parties entitled to the reversion, for two lives, pursuant to the covenant for renewal therein contained.

For some time after the decease of *John Alleyne*, no person was aware of the existence of the deed of March, 1833. It was found by *Ellen Alleyne* in an iron safe belonging to her father in his office, and she immediately forwarded it to the solicitor for the minor, who had been previously made a ward of court. The present bill was filed, pursuant to an order of the Court made in the matter of the minor, for the purpose of ascertaining his right to the lands; and it prayed that it might be declared that, by virtue of the indenture of the 5th March, 1833, *John Alleyne* became entitled to all the estate and interest which *Samuel Alleyne* had under the lease of the 14th of April, 1779, and the covenant for renewal therein contained: or in case the Court should be of opinion

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that, under that indenture, *John Alleyne* did not become entitled to such estate and interest, then that it might be declared that *John Alleyne*, under the will of *Samuel Alleyne* or as his heir at law, became absolutely entitled to all the estate and interest which *Samuel Alleyne* was entitled to in said lands at his death; and that the plaintiff, as heir at law of *John Alleyne*, and under the circumstances aforesaid, became entitled to the said lands upon the death of *John Alleyne*, and was then entitled to them for the estate and interest therein granted to the defendant by the indenture of renewal: and that it might be declared that the defendant obtained said renewal as a trustee for the plaintiff; and that the rights of the plaintiff in respect of said lands might be ascertained.

Ellen Alleyne answered, admitting the above facts; and claiming to be entitled to the lands under the will of *Samuel Alleyne*, inasmuch as *John Alleyne* did not recover from the illness under which he suffered at the time of the execution of the will, and under which he continued to suffer from thence to the time of his death. She further alleged, that *Samuel Alleyne* was desirous that his son *John* should be married to a lady, whose name she declined to mention; and that, in order to promote the marriage of *John Alleyne*, *Samuel* and *John Alleyne* affixed their hands and seals to the deed of March, 1833; but that it was not intended by either party that the deed should be a perfect and complete instrument until the marriage was had: and therefore it was that *Samuel Alleyne* retained possession of the deed and the control of the lands. She submitted that there had not been an absolute delivery of the deed of 1833; or if there had, and that the estate passed thereby, that *John Alleyne* took it in trust for *Samuel Alleyne*.

No evidence was given, other than the statement in the deed of 1833 itself, that it had been executed in contemplation of any marriage of *John Alleyne*. Its execution by both parties was proved by the subscribing witnesses. It is also in evidence that *John Alleyne* resided with his mother, *Samuel Alleyne*, up to his death: and that at the time when *Samuel Alleyne* made his will, and from thence up to the decease of *John Alleyne*, the latter was labouring under an attack of paralysis of the brain, of which he ultimately died; and that *Samuel Alleyne* knew when he made his will, that it was not probable that his son would ever recover from his illness.

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Mr. *James O'Brien* and Mr. *Christian* for the plaintiff.

Argument.

1. The conveyance of 1833 cannot be considered imperfect, for there is no evidence that any particular marriage whatever was then in the contemplation of the parties. It cannot be said that it was executed for a special purpose which never has been completed. Then the mere circumstance that the deed is voluntary, and that it was retained in the possession of the grantor, is not sufficient to impeach or destroy its efficacy: *Barlow v. Heneage*(a); *Clavering v. Clavering*(b); *Sear v. Ashwell*(c); *Worrall v. Jacob*(d). The cases which, apparently, contradict this proposition depend upon special circumstances. In *Naldred v. Gilham*(e) an option had been practised on the grantor, in that a power of revocation was not inserted in the voluntary settlement. *Birch v. Blagrove*(f), in which the deed had been used for the purpose for which it was executed,

(a) Prec. Ch. 210.

(d) 3 Mer. 256.

(b) 2 Ver. 473.

(e) 1 P. Wms. 576.

(c) 2 Swanst. 411 (n).

(f) Amb. 264.

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was decided on the ground of mistake and misapprehension in the grantor. *Platamone v. Staple(a)*, in which the deed had been executed, but not used, for the purpose of giving a qualification to the grantee, was an interlocutory application for an injunction until the hearing, and merely decided that there was a question to be tried. *Cecil v. Butcher(b)* was similar to *Platamone v. Staple*. In *Boughton v. Boughton(c)* Lord *Hardwicke* said that there was no case in which a voluntary settlement had been set aside by a subsequent will.

2. As to the construction of the will of *Samuel Alleyne*. The condition, "in case he shall recover from his present illness," is void for uncertainty; therefore the devise to *John Alleyne* is a gift to him absolutely. But if the condition be valid, yet the appointment of *Ellen Alleyne* to be the testator's residuary legatee will not give her the undisposed of residue of his real estate: *Willis v. Willis(d)*. In *Pittman v. Stevens(e)* it was held that real estate passed under an appointment of a person as residuary legatee, on the ground that the testator manifested an intention to dispose of all his estate, real and personal, to him.

Mr. *Pigot* and Mr. *J. D. Fitzgerald* for the defendant.

1. The instrument of 1833 was executed for a special purpose, which was not acted on; and therefore it is inoperative: *Cecil v. Butcher(f)*.

When the deed is not executed for some special purpose, but the object of the parties, at the time, is that expressed

(a) Coop. 250.

(b) 2 J. & W. 565.

(c) 1 Atk. 625.

(d) 1 Dru. & War. 439.

(e) 15 East, 505.

(f) 2 J. & W. 565.

in the deed, it is valid and operative though the grantor should afterwards change his intention and attempt to dispose of the property in some other way. Such are the cases of *Barlow v. Heneage*(a); *Bolton v. Bolton*(b); *Dillon v. Coppin*(c); and *Jefferys v. Jefferys*(d). But where the deed is executed for a special purpose, which is illegal, and the deed has been acted on, the Court will not relieve against it: as in *Doe v. Roberts*(e); *Curtis v. Perry*(f); *Montefiori v. Montefiori*(g). But, if the deed has not been acted on, Equity will relieve: as in *Plantagenet v. Staple*(h); *Birch v. Blagrove*(i); *Ward v. Lant*(k). This is a stronger case than any of those: for the purpose in which the deed was executed is legal; and it never has been acted on.

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2. The circumstances show, that if *John Alleyne* took the estate under the deed of 1833, he took it as trustee for *Samuel Alleyne*. A trust may be raised by implication from the acts of the parties: *Forster v. Hale*(l).

3. Under the will of *Samuel Alleyne*, the defendant is entitled to the undisposed of real estate of the testator: *Nicholls v. Butcher*(m); *Pittman v. Stevens*(n).

Mr. *Christian*, in reply, cited *Grey v. Grey*(o); *Winslow v. Tighe*(p).

(a) Prec. Ch. 210.
(b) 3 Swanst. 414 (n.)
(c) 4 M. & C. 647.
(d) Cr. & P. 138.
(e) 2 B. & A. 367.
(f) 6 Ves. 739.
(g) 1 Black. 363.
(h) Coop. 250.

(i) Amb. 264.
(k) Prec. Ch. 182.
(l) 3 Ves. 696.
(m) 18 Ves. 193.
(n) 15 East, 505.
(o) 2 Swanst. 594.
(p) 2 Ball & B. 195.

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THE LORD CHANCELLOR :—

The question is, whether the plaintiff, *Samuel Alleyne*, as the representative of *John Alleyne*, his uncle, is entitled to the estate? It is alleged in the answer that, by deed of March, 1833, was executed, *John Alleyne* about to marry; but no evidence has been given of a marriage for any such marriage, or that *John Alleyne* had then in contemplation a marriage with any particular lady. The question depends solely upon the evidence afforded by the expressions contained in the deed of March, 1833. *John Alleyne* the elder, who was an attorney, prepared the deed, it is all in his own handwriting; and thereby he designated *John Alleyne* as his eldest son: and, “in consideration of the natural love and affection which he, *Samuel Alleyne*, had for his son *John*, and in order to advance him and to entitle him to a wife and fortune (now in possession),” *Samuel Alleyne* conveyed the lands to his son *John* “to hold the same to and for the sole and separate use and enjoyment of him, the said *John Alleyne*, his heirs and assigns, forever, subject to the yearly rent reserved and payable to the said *Samuel Alleyne*. These are rather unusual terms for an attorney to use; but they manifest the intention that the son should have an absolute dominion over the lands.

Three objections have been made to the title of the plaintiff, who is the heir at law of the grantee in the deed. First, that this is a conditional conveyance, executed for a specific purpose, which has never been performed; therefore, the estate did not pass under the deed. Second, it has not been argued that the estate never vested in the son: and it cannot be contended that this was a

use in favour of the son, to arise only in case of that marriage taking place, which is alleged, but not proved to have been then in contemplation : for this is a common conveyance ; founded, it is true, upon a lease for a year ; but the release is to the use of the releasee, his heirs assigns, for ever ; which vests the *quasi* fee immediately in the son. There is no declaration that the use is to arise in the son in case he should marry. The next question is, whether what has since happened has divested the estate from the son. On behalf of the plaintiff it is urged that there is no evidence that any particular marriage was then in contemplation ; and that circumstance, together with the expressions of *Samuel Alleyne* contained in the deed, satisfies me that, in legal construction, the son took the whole of the fee ; and that his estate did not determine by his not marrying. I think that the provision made by the deed was made with a view to his marriage generally, and that the *quasi* fee was vested in him with that view. The recitation of the deed is also an important circumstance ; though it cannot explain the deed itself, it indicates to the parties considered to be the true nature of the transaction. *Samuel Alleyne* omitted for some time to register the deed ; and then by his own special direction, it was forwarded to Dublin to be registered. He thereby showed that he did not consider the deed as inoperative at the end of nine months from its execution ; within which period it is reasonable to suppose, that any treaty of marriage in contemplation at the time of its execution, if such there were, would have been concluded or broken off. It would be too dangerous to hold that the deed was to be at an end if no marriage were solemnized ; for the object might have been to enable him to advance himself in life by rendering himself capable of making a settlement upon any wife he might

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marry. Another objection is raised,—that the retention of the deed by *Samuel Alleyne*, and the various acts of the father and son which have been detailed in the evidence, show that there was an agreement between the parties, at the date of the execution of the deed, that it should not have operation. If a man make a voluntary conveyance for an indirect purpose, and it is acted on, it has been held that it is binding upon him, although he might not have intended the deed to have such an operation. That, however, is a different question from the present. In most of the early cases which have been cited, the grantor derived some advantage from the execution of the deed; but it is not so in the present case. Those cases have, therefore, no bearing upon the present, in which the father meant to vest the fee simple in his son for his exclusive benefit. It was argued, that it might have been the intention of the father that such his object should not take effect, unless his son married a particular lady. I do not think that there was any such intention upon the part of the father; there is no direct evidence of such an intention; but it is attempted to be inferred from certain acts of both the father and son. This deed (I may remark) cannot be represented as a voluntary settlement executed by the father alone; it was executed by both father and son: the father and son were both aware of the title of the son under the deed, although the father retained it in his own custody. This case is not like the cases referred to, where there was no registration, and where the grantor, who alone executed it, locked up the document, so that its existence was unknown to the grantee until after the death of the grantor; from whence it might be inferred that there was no intention upon the part of the grantor that the deed should have immediate operation. I cannot hold this instrument to be private,

after it was held forth to the world as having been executed for the advancement of the son. It, therefore, appears to me that the circumstances to which I have alluded exclude the presumption arising against the title of the son in consequence of the father's having retained the deed in his own possession. The other circumstances relied upon by the defendant are not unlikely ones to take place between father and son. They are ambiguous, and may tell either way. In *Grey v. Grey*(a) Lord Nottingham observes: "If the son be not at all, or but in part, advanced, then if he suffer the father, who purchased in his name, to receive the profits, &c., this act of reverence and good manners will not contradict the nature of things, and turn a presumptive advancement into a trust." The evidence relied upon, on this part of the case, are proposals to *Samuel Alleyne* for leases, by certain tenants whose leases had expired, and who were desirous to obtain renewals; some of which are in the handwriting of the son, and others are witnessed by him: and also the depositions of several of the tenants, showing that *Samuel Alleyne* continued in the receipt of the rents and management of the property. Those acts, however, admit of explanation. The son, living in the house of his father, and being maintained by him, although he knew his title, might not have liked to disturb his father's arrangements, and might have allowed him to perform those acts, and in fact have consented to them. It was said, but after such conduct he never could have contested his father's title. I think that he never could have impeached any lease which was thus granted; and that he bound himself, as against the lessee, by his concurrence with his father, although he might have impeached the title of any person

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(a) 2 Swanst. 594.

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claiming under the father alone ; he had the legal estate, and might at law have recovered even against the father himself. These documents operate as against the son, only so far as the tenants were concerned. Then what weight is to be given to the other acts relied upon ? I think none of them are entitled to any weight, save one, which is rather in favour of the son : viz., that, when about to attend some races, he, without authority from his father, went to the tenants and took up from them as much money as he required for his purposes ; which sums, so advanced, it is proved his father allowed in the accruing rents. This was either a direct act of ownership of the son, or at least it shows that both the father and son were dealing with the estate as their own ; and that either the father allowed the son, or the son allowed the father to receive sums of money from the tenants. I do not attach much weight to the power of attorney which has been given in evidence, whereby the father appointed a third person to receive the rents ; it only shows that it was not the wish of the parties that the son should act as receiver. It was an act quite consistent with the nature of the transaction. Upon the true construction, therefore, of the settlement, and considering that it was executed by both the father and the son, for the benefit of the son, and that it was registered by the father nine months after its execution, I am of opinion that the *quasi* fee became vested in the son, who thereby became legally seised of the property ; and that it was so vested in him to enable him to make a settlement upon his marriage with any person he pleased. This state of things having continued during his entire life, I see no reason for holding that the deed ceased to operate by reason of the son's having survived the father and never having married. I do not think that the acts of the father defeated the title of the son under the deed. I

not say whether those acts amount to a manifestation of such an intention or not. In my opinion this is a valid instrument; and if so, the question respecting the will does not arise.

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But, supposing that the will came into operation, it raises a very serious question; for the father shows his intention of passing everything he had, and I cannot cut down his previous gift of all such real, freehold, and personal property as he should die seised or possessed of, or entitled unto, in any right or by any means whatsoever, by reason of the following words; and confine the residuary gift to his personal estate. All his property must, therefore, be passed to the son, in case "he should recover from his present illness;" which could hardly be a condition precedent, for who could possibly tell whether he recovered from that illness or not? It might be known, if he died, that the condition was not fulfilled; but if it be a condition precedent, I cannot tell when the gift is to arise. If, therefore, this were a condition precedent, it would be void for uncertainty; and the only way in which operation is to be given to the will is by holding it to be an immediate gift to the son in fee, with a gift over in case he should not recover. But the singularity in this case is, that there is not one word in the will which speaks of this as a contingent gift; or the testator merely says that he appoints the defendant his residuary legatee; and recommends her, in case she should marry, to have such property as he left her settled upon herself: so that he points to one contingency only, viz., her marriage; but he does not say one word concerning the other alleged contingency, viz., the son's not recovering from his present illness. From that it would seem that he took it for granted that his son would take the pro-

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perty absolutely under the gift, and not merely in the case of the alleged contingency happening. I am strongly inclined to think that such was his intention : and although I cannot construe these instruments by evidence *dehors* them, I am at liberty to look into all the circumstances, to enable me to place myself in the situation of the testator when he made his will. The testator knew that his son was labouring under a fatal disorder ; he gave him the property in case he should recover, and it appears that the son lived nine months after his father's death. I think that the only sound construction which can be given to the will is, to hold this to be a gift to the son in case he did not die from that fatal disorder in his father's life-time. If the testator had said, " If my son recover from his present illness, I give him this property," it could hardly be doubted that he meant that if his son should survive him, he should have the property. I think that is the sound construction of the will : but I am not called upon to decide the point, because, under the deed, as I have before said, the son's title is a valid one. There must, therefore, be a decree for the plaintiff, and it must be referred to the Master to take the proper accounts.

PEPPARD v. KELLY.

June 23.

To a bill to raise a demand out of property vested in trustees for the separate use of a *feme covert*, the trustees ought to be made answering parties.

THE bill was filed to raise the amount of a judgment debt, obtained on a bill of exchange, out of the separate estate of the defendant, a married woman, living separate from her husband.

The separate property consisted, amongst other things, of an annuity charged on lands which had been conveyed

trustees, in trust to pay the annuity to the separate use
of the wife.

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The trustees had been made notice parties to the suit.
They did not appear.

Mr. *Monahan* for the plaintiff.

Mr. Sergeant *Warren*, for the defendant, objected that
the trustees should have been made parties in the ordinary
way, for that the *feme covert* was entitled to their presence
to protect her rights.

Mr. *Monahan*.—This objection is not taken by the an-
swer of the defendant. The trustees might have appeared
if they pleased.

THE LORD CHANCELLOR :—

The defendant could not know that the trustees would
not appear ; and she could not object that they were not
parties to the record. I think that this is a case which does
not fall within the 15th General Rule.

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Leave to amend, by adding parties, given.

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Judgment.

perty absolutely under the gift, and not merely in the event of the alleged contingency happening. I am strongly inclined to think that such was his intention: and although I cannot construe these instruments by evidence *dehors* the will, I am at liberty to look into all the circumstances, to enable me to place myself in the situation of the testator when he made his will. The testator knew that his son was labouring under a fatal disorder; he gave him the property in case he should recover, and it appears that the son recovered nine months after his father's death. I think that the sound construction which can be given to the will is to hold this to be a gift to the son in case he did not die of that fatal disorder in his father's life-time. If the testator had said, "If my son recover from his present illness I will give him this property," it could hardly be doubted that he intended that if his son should survive him, he should have the property. I think that is the sound construction of the will, but I am not called upon to decide the point, because, from the deed, as I have before said, the son's title is a valid one. There must, therefore, be a decree for the plaintiff, and the case must be referred to the Master to take the proper account.

PEPPARD v. KELLY.

June 23.

To a bill to raise a demand out of property vested in trustees for the separate use of a *feme covert*, the trustees ought to be made answering parties.

THE bill was filed to raise the amount of a judgment obtained on a bill of exchange, out of the separate estate of the defendant, a married woman, living separate from her husband.

The separate property consisted, amongst other things, of an annuity charged on lands which had been co-

tees, in trust to pay the annuity to the separate use
wife.

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trustees had been made notice parties to the suit.
did not appear.

Monahan for the plaintiff.

Sergeant *Warren*, for the defendant, objected that
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or that the *feme covert* was entitled to their presence
ect her rights.

Monahan.—This objection is not taken by the an-
f the defendant. The trustees might have appeared
pleased.

LORD CHANCELLOR :—

defendant could not know that the trustees would
pear ; and she could not object that they were not
to the record. I think that this is a case which does
l within the 15th General Rule.

Judgment.

ve to amend, by adding parties, given.

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PEYTON v. BROWNE.

June 23.

"The costs occasioned thereby," in the 18th General Order of 1843, are the costs occasioned by the defendant entering an appearance in common form, and not merely the costs occasioned by his answer.

THE bill was filed to foreclose a mortgage of 1833. *Pickering*, a creditor of the mortgagor, by judgment of Michaelmas Term, 1840, was made a notice party, pursuant to the 15th General Order of 1843. He was served with a notice pursuant to that rule, and entered a common appearance, but did not answer; and the bill was taken *pro confesso* against him. Preliminary accounts having been taken, the cause was set down to be heard.

Mr. *Brooke*, for the plaintiff, asked that a direction should be inserted in the decree, ordering *Pickering* to pay the costs of taking the bill *pro confesso* against him.

Judgment. THE LORD CHANCELLOR :—

The 18th General Order does not, in terms, provide for this case; for the judgment creditor has not answered; but by his conduct he has rendered it necessary to take the bill *pro confesso*, against him. The word "thereby," in the 18th General Order, refers, I think, to all the costs occasioned by the defendant entering the common appearance, and not merely to the costs occasioned by the answer. The only question is, whether I can now give those costs against him, for he is not present at this hearing. I think the better way is to give the plaintiff liberty to apply for the costs.

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articles of agreement, bearing date the 12th of February, 1825, and made between Sir *David Roche* of the part; *Rosetta Vandeleur*, widow, and *Frances Vandeleur*, her daughter, of the other part; after reciting, that marriage was intended to be had and solemnized between *David Roche* and *Frances Vandeleur*; that *Frances Vandeleur* was, by virtue of the will of her father, entitled to a sum of £6000, secured as therein mentioned; that Sir *David Roche* was seised and possessed of, or justly entitled to certain lands and premises therein particularly mentioned, situated in the county of Limerick; and was also entitled to a sum of 7000*l.* Government Three-and-a-half Cent. Stock; and that he was then in treaty for the purchase of certain lands and premises in the county of Limerick, for the discharge of the purchase-money whereof it was intended to apply the said sum of 7000*l.* Stock; it was covenanted and agreed upon, in consideration of the marriage, and of the fortune of *Frances Vandeleur*, to be settled as thereafter mentioned, that the 6000*l.*, the for-

By articles executed in consideration of marriage, and the fortune of the wife, it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest, and also the principal sum (subject to an annuity by way of jointure for the wife) to the issue of the marriage, in such shares and proportions, or to any one or more of them, in exclusion of the others of them, as the husband should by deed or will appoint; and in default of appointment, to all the issue in equal shares, to such of said issue as should

be at twenty-one, and to such of them as should be daughters at twenty-one or marriage. And that power should be given to pay, towards the advancement of any of said issue, a sum not exceeding one-half of the principal sum belonging to such child respectively; and that there should be no issue, or all such issue should die in the life-time of the husband, that the entire of the trust funds subject to the jointure should vest and be assigned, to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. And it was further agreed that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper.

Held,—1. That the word “issue,” in the articles, was to be read “children.”

2. That the settlement ought to contain clauses vesting the shares of the sons in them at twenty-one; and of the daughters, in them at twenty-one or marriage: and also clauses of worship and accretion of the shares of sons dying under twenty-one, and of daughters dying at that age without having been married, in favour of the surviving or other children.

3. That the husband was entitled to the fund, either in the event of his surviving all his children, or of no child attaining a vested interest therein; and that the settlement ought to contain clauses accordingly.

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tune of *Frances Vandeleur*, should be assigned and conveyed to two trustees, their executors, &c., one whereof to be named by Sir *David Roche*, the other by *Rosetta Vandeleur*, in trust as thereafter mentioned : and also that the several lands and premises thereinbefore mentioned should be charged with a sum of £5000, which said sum should be paid to and vested in the said trustees, upon the trust thereafter mentioned, unless the same should have been previously applied in and towards the completion of the purchase aforesaid ; and in the event of said purchase being completed, then that the lands and premises so purchased should be subject to the like trusts, as far as the different nature of the estates would permit, as was thereafter declared of and concerning the sum of 7000*l.* Stock. And it was further covenanted and agreed upon, that the said trustees should stand possessed of the said several sums of 6000*l.*, 5000*l.*, and 7000*l.* Government Stock, in trust, in the first place, to pay 100*l.* per annum, out of the interest and profits thereof, to *Frances Vandeleur*, during the life of her intended husband, to her separate use, by way of pin money, and to pay the residue of the interest and proceeds thereof to Sir *David Roche* during his life ; and after his death to pay to *Frances Vandeleur*, in case she should survive Sir *David Roche*, out of the interest and proceeds of said several sums of money, an annuity by way of jointure. The articles then proceeded thus : “ And it is hereby further covenanted and agreed, by and between the parties aforesaid respectively, that the said trustees shall pay the residue of the said interest and proceeds of said several sums as also the principal of said several sums, subject to the jointure of the said *Frances Vandeleur*, and after payment thereof, to and amongst the issue of said intended marriage in such shares and proportions, and subject to such condi-

tions and limitations, and at such time and times respectively, or to any one or more of them, in exclusion of the others of them, as the said *David Roche* shall by deed or will, under his hand and seal, and attested by two or more credible witnesses, limit and appoint; and in default of appointment, then that said trustees shall pay the said several sums to and amongst all the issue of said intended marriage, in equal shares and proportions; to such of said issue as shall be sons, at their respective ages of twenty-one years; and to such of them as shall be daughters, at their respective ages of twenty-one years or days of marriage, whichever shall first happen. And is hereby further agreed upon, by and between the said parties respectively, that a power shall be given to the said *David Roche* during his life-time, and to the said *Frances Vandeleur*, from and after the death of said *David Roche*, and to the said trustees, their heirs, executors, administrators, and assigns, respectively, after the death of both said *David Roche* and *Frances Vandeleur*, to pay and cause to be paid, towards the advancement in life of any of said issue of said marriage, any sum not exceeding one-half of the principal sum respectively belonging to such child respectively. And it is hereby further agreed upon, by and between the parties to these presents, that in case the said sum of 7000*l.*, Three-and-a-half per Cent. Stock, shall be applied in the purchase of lands in pursuance of the treaty for such purchase as aforesaid, then that said lands, so purchased, shall be assigned and conveyed to said trustees, in trust for said *David Roche* during his life; and from and after his death in trust to secure the jointure of the said *Frances Vandeleur*, as aforesaid; and, subject thereto, in trust for the issue of said intended marriage, as aforesaid. And it is hereby further

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agreed by and between the respective parties to these presents, that in case there shall be no issue of said intended marriage, or all such issue shall die in the life-time of said *David Roche*, then that the entire of said several sums of money, or the lands to be purchased as aforesaid, subject to the jointure of the said *Frances Vandeleur* as aforesaid, shall vest in, and be assigned and go to the said *David Roche*, his heirs, executors, administrators, and assigns, absolutely, to and for his and their sole use and benefit. And it is hereby further covenanted and agreed by and between the said parties respectively, that at any time hereafter, at the desire of either the said *David Roche* or the said *Frances Vandeleur*, or *Rosetta Vandeleur*, a regular deed of settlement shall be made and executed by and between the several parties hereto respectively, which said deed shall contain the several clauses and covenants in such cases usual and proper." And it was thereby further covenanted and agreed, that said deed of settlement should contain a power to appoint new trustees; and to change the securities upon which the trust funds were invested. "And it is hereby further covenanted by said *David Roche*, for himself, his executors and administrators, to and with the said *Rosetta Vandeleur*, her executors and administrators, that in case said lands and premises, hereinbefore particularly named and specified, shall not, upon inquiry, be found to be a sufficient security for the said sum of 5000*l.*, so as aforesaid to be charged thereon, that he, the said *David Roche*, shall name and specify other lands and premises, which, in addition to those hereinbefore named and specified, shall be inserted in the settlement to be executed in pursuance of these articles, and charged with said sum of 5000*l.*, or otherwise properly secure the same; so as that a sufficient security, to the satis-

ction of said *Rosetta Vandeleur*, her executors or administrators, shall be provided for the raising thereof, or payment, of said charge or sum of 5000*l*."

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The marriage was afterwards solemnized; and on the 17th of September, 1841, *Frances Roche* died, leaving *David Vandeleur Roche*, *Rosetta Roche*, *Alice Roche*, and *Frances E. Roche*, the only issue of the marriage, her surviving. The treaty for the purchase of the lands in Kerry having been completed, those lands were, by indenture of the 4th of July, 1825, conveyed to Sir *David Roche* for the residue of a term of 500 years therein, in consideration of the sum of 7000*l*., partly the produce of the 7000*l*. Government Stock. No settlement was executed pursuant to the articles.

The bill was filed by the children of the marriage, all of whom were minors, against Sir *David Roche* and others, stating the above facts, and that Sir *David Roche* had nominated *Edward Browning* as his trustee; and thereby the plaintiffs submitted, that, upon the true construction of the articles, the expression "issue," in the articles, must be held to mean "children;" that a clause of accruer and survivorship, in case any of the children, if sons, should die under twenty-one, or, if daughters, should die under twenty-one and unmarried, should be inserted in the settlement; and also that the proviso in the articles, "that if all such issue shall die in the life-time of Sir *David Roche*," must be construed to mean, if all such children die, if sons, under twenty-one, and if daughters, under twenty-one, or unmarried.

The bill further set forth, that Sir *David Roche*, in order to provide a more effectual security for the sum of 5000*l*.

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charged on the lands named in the articles, had agreed that his interest in certain other lands therein named should be charged with the said sum of 5000*l*. The prayer was, that Sir *David Roche* might be directed to execute a settlement in pursuance of the articles; and for a declaration whether, according to the true construction of the articles, the word "issue" must not be construed to mean children; and further, whether a clause of accruer and survivorship, in case the sons should die under twenty-one, or the daughters should die under twenty-one and unmarried, should not be inserted in said settlement; and also whether the ultimate limitation, to be inserted in the settlement in favour of Sir *David Roche*, should not be only in the event of the sons dying under twenty-one, and the daughters under that age and unmarried: and that, if necessary, it be referred to the Master to settle a proper deed of settlement in pursuance of the articles.

The defendant submitted to act as the Court should direct.

Mr. *Reeves*, for the plaintiffs, cited *Ridgeway v. Musketterick*(a), as to the meaning to be given to the word "issue:" *Hubert v. Parsons*(b), and *Hynes v. Reddington*(c), as to the introduction of the clause of accruer und survivorship: and *Jervoise v. The Duke of Northumberland*(d), as cited by the Vice-Chancellor in *Stonor v. Curwen*(e).

Mr. *William C. Dobbs* for Sir *David Roche*.

(a) 1 Dru. & War. 84.

(d) 1 J. & W. 559.

(b) 2 Ves. 261.

(e) 5 Sim. 268.

(c) Ll. & G. temp. Plunk. 33.

THE LORD CHANCELLOR observed that the proper course, to refer it to the Master to approve of a deed of settlement, pursuant to the articles; and then the parties might except, if they were not satisfied with the settlement approved of. But in the present case, at the request of the parties, his Lordship permitted the questions to be tried in the first instance.

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Argument.

THE LORD CHANCELLOR :—

In this case I am called upon to put a construction upon accurate marriage articles. The settlement was of money, and it was to be charged upon land, or to be laid out in land, the fortune of the wife, and the property of the husband. The first question is whether this settlement is to be confined to children; and I am of opinion that it is, for the death of the husband, subject to the wife's jointure, the property is to go to and amongst the issue of the marriage, as Sir *David Roche* shall appoint; and, in default of appointment, to be paid to and amongst all the issue of the marriage equally, to such as shall be sons at twenty-one, or to such as shall be daughters at twenty-one, or marriage. There is a power of advancement, in favour of the issue of the marriage, of any sum not exceeding one-third of the principal sum belonging to such child respectively; and there is a declaration that, in case there shall be no issue of the marriage, or all such issue shall die in the husband's life-time, then the monies or lands to be purchased, subject to the jointure, shall vest in the husband, his heirs, executors, administrators, and assigns, absolutely. It appears to me that the parties intended to provide for the first line of issue only, viz., children: that is the natu-

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ral construction of articles like these ; and the parties have explained that to be their meaning, for they have treated the words *issue* and *child* as synonymous ; and it appears to me that I cannot put one construction upon the word *issue* in one part of the articles, and a different construction upon it in another part ; for no intention is shown to use it in a different sense. If this require any authority, it is furnished by the case of *Campbell v. Sandys*(a). Lord *Redesdale*, in his judgment, observed(b) : “ The word ‘issue’ is ambiguous ; it may mean either ‘children,’ or ‘issue *in infinitum*.’ In the present case, I think it impossible, upon the words ‘to the issue of the said *John* and *Anne*,’ not to say that the word ‘issue’ was used as synonymous to a child, and was not meant to express issue indefinitely. The issue were to take in such shares as *John Campbell* should appoint, which could not apply to issue indefinitely, nor did the power of appointment extend to any limitation of estate ; and the next clause, which disposes of the property in default of appointment, uses the word ‘children’ as describing the same persons before described by the word ‘issue.’ And the subsequent words, ‘for default of such issue,’ must therefore, I think, receive the same construction,” &c. The settlement is, therefore, to be as the father shall appoint amongst the children exclusively, or otherwise as directed ; and in default of appointment amongst the children, as tenants in common.

I am then asked to introduce a vesting clause to sons at twenty-one, and to daughters at twenty-one, or marriage. The articles direct that the settlement shall contain the several clauses and covenants in such cases usual and

(a) 1 Sch. & Lef. 281.

(b) Pages 292, 293.

per. Independently, therefore, of the general construction, and Lord *Hardwicke's* opinion in the case referred to *Hubert v. Parsons*, I think that clauses of vesting at specified ages or times are proper and usual in this case. I think also that no part was to go over to the father unless the whole went over; and, therefore, that regular and usual uses of survivorship and accruer of the shares of sons dying under twenty-one, and of daughters dying under twenty-one, without having been married, should be introduced in favour of the surviving or other children. No child, I think, was intended to take a vested interest who did not attain the specified age.

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The remaining question is, whether the limitation over Sir *David Roche* is to be confined to the case of there being no child who lives to take a vested interest. I have already stated that the word *issue* in this ultimate limitation means children: "In case there should be no issue;"—that is, children, for these words are intended to provide for the case there being no child born,—“or all *such* issue shall die within Sir *David's* life-time,”—that is, if there shall be children born, but they shall die in their father's life-time,—to him. I cannot construe the word *issue* here generally, although the children may all die in his life-time, and yet some may leave issue unprovided for; because that event was not, in my opinion, intended to be provided for: nor can I construe it as a regular limitation over simply in default of the children taking a vested interest; because it is given to the father upon a contingency, viz., in case he shall survive without children; and I cannot vary the event upon which it is to go over. If it had been intended to go over to him only in the event of the children not becoming entitled to the fund, it would not have been given on this contingency;

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for if they did not become entitled he must have been entitled to take the funds, whether he survived them or not. He took the interest for life (subject to the pin-money), and there was nothing irrational in giving to him the fund absolutely, in case he should survive all his children.

I have already directed, as requested, vesting clauses to be introduced; but although the fund is expressly given to the father, if he survive the children, yet another case may happen, which is not provided for any more than vesting clauses and clauses of survivorship and accruer, viz, no child may attain a vested interest, but some of them may survive their father. Now it is perfectly settled that where a husband, as in this case, is a purchaser of the wife's portion, and it is in a particular event left unsettled, it belongs to the husband; and of course his own funds, as far as they are not settled, would result to him. This event is, perhaps, not likely to happen; but I think that there should also be a limitation over of all the funds, subject to the power, and to the provision for the wife, and in default of any child living to take the vested interest in default of appointment, to Sir *David Roche*. This would be the legal effect of the settlement, even if no such clauses should be introduced; and it is not inconsistent with the express gift to him, upon the contingent event of his surviving his children, although they might all have attained twenty-one. The latter is part of the contract; the former is a consequence of the contract not having declared any trust of the funds in the given case.

Let the Master approve of a settlement, having regard to these declarations; and let him inquire whether the 5000*l.* will be well secured upon the original estate and the pro-

perty now proposed to be added; and let him inquire whether any incumbrances have been created by Sir *David Roche* on the Kerry estate. The costs of all parties to be paid out of the settled funds. Reserve liberty to any of the parties to apply if there shall be occasion.

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May 30.

June 2, 6.

JOHN ALDER being entitled to a house and premises in Thomas-street, in the city of Dublin, under a lease thereof bearing date the 15th of May, 1795, made by *William Earl of Meath*, for the term of three lives renewable for ever, subject to the yearly rent of 11*l.* 10*s.*, and a like sum as a renewal fine on the fall of each life, by indenture of lease and release of the 10th of April, 1799, demised same to *Dominick O'Connor* and his heirs, for the lives of the same three persons who were named in the then lease from the *Earl of Meath*, and for the lives of such other persons as should from time to time, for ever thereafter, be added thereto, pursuant to the covenants thereafter for that purpose contained; at the yearly rent of 45*l.* 10*s.*, payable on the 25th of March and 29th of September in every year, by equal portions; with powers of distress and entry for recovery thereof. And *John Alder*, for himself, his heirs and assigns, covenanted with *Dominick O'Connor*, his heirs and assigns, that upon the death of the *cestuis que vie* therein named, or any of them, which should first hap-

A bill by a landlord against the assignee of his lessees for lives renewable for ever, to compel her, pursuant to a covenant in the lease, to accept a renewal, was dismissed; she having become assignee under circumstances which rendered it inequitable in the landlord to compel her to accept the renewal: and it was dismissed with costs; the Court being of opinion that, independently of those circumstances, the landlord had, by his *laches*, lost the right to enforce the acceptance of the renewal.

The object of the Tenantry Act (19 & 20 Geo. III. c. 30), and of the local equity of the Kingdom, of which it is declaratory, is only the relief of the tenant, not that of the landlord; therefore, where a *cestui que vie* died in 1802, and in 1842 the landlord filed his bill against an assignee of the lessee, to compel her to accept a renewal, the bill was dismissed with costs, though the case was one of mere *laches*.

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pen, and within three months to be computed from the day of the death of such person so happening first to die, upon payment of the sum of 11*l.* 10*s.* sterling by *Dominick O'Connor*, his heirs or assigns, as a fine, he, the said *John Alder*, his heirs and assigns, naming the life of any other person in the place and stead of the person so happening first to die, as aforesaid, he, the said *John Alder*, his heirs and assigns, should and would add and insert to the time and term of the lease, the life of such person so nominated, in the place and stead of the person so happening to die, as aforesaid; which life to be nominated and inserted, was to be indorsed on the lease, or written in a deed, label, or parchment, to be affixed to the lease for that purpose, or in a separate deed or writing, declaring the life or lives last failing, and the life and lives so added in lieu thereof: and in like manner from time to time, successively, for ever thereafter, on the failure of every other several life and lives in the lease named, or thereafter to be nominated, and upon the like payment of the fine of 11*l.* 10*s.* sterling, by *Dominick O'Connor*, his heirs or assigns, within three months after the death of every other such several life or lives in being, and so to be nominated as aforesaid, unto the said *John Alder*, his heirs and assigns, upon the like nomination of any other life and lives successively, in lieu of every other such several life and lives of such person and persons, so successively dying as aforesaid; which life and lives to be added and inserted successively, were to be endorsed on the lease, or written on deeds, labels, or parchments, &c. (*ut ante*); so that the said *Dominick O'Connor*, his heirs and assigns, might at all times for ever thereafter, have a term for three lives, in being and undetermined, in the premises, at and under the rents and covenants therein contained: all which deeds of renewal were to be at the

cost and charges of *Dominick O'Connor*, his heirs and assigns. And *Dominick O'Connor* covenanted with *John Alder*, his heirs and assigns, that he, his heirs or assigns, should and would, within three months after the death of every person or persons, for whose life and lives the premises were thereby granted, and of every other person or persons, for ever thereafter to be nominated and added thereunto, according to the covenants and agreements therein contained, require *John Alder*, his heirs and assigns, to nominate and appoint one other person in the place of every other person so dying; and at the same time pay to *John Alder*, his heirs and assigns, 11*l.* 10*s.*, as a fine on such renewal, and likewise all arrears of rent which should happen to be then due, for the further and better assuring the demised premises unto *Dominick O'Connor*, his heirs and assigns, according to the true intent and meaning of the indenture of lease.

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The interest of *Dominick O'Connor* in the lease of 1799, afterwards became vested in *Patrick Kavanagh*; who, in 1835, conveyed same to *Humphrey Peare*: and the estate of *John Alder* became vested in the plaintiff, *Charles Findlay Alder*.

Two of the lives named in the leases of 1795 and 1799 having died, one in May, 1802, and the other in August, 1834, *Charles Findlay Alder*, on the 14th of August, 1827, and the 8th of August, 1837, obtained renewals of the lease of 1795, from the Earl of *Meath*. The persons entitled to the lessee's interest in the lease of 1799 never were called on to take out a renewal of that lease, until the period after mentioned.

In and previous to 1840, *Elizabeth Ward*, the defendant,

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was in possession of the premises demised by the lease of 1799, as tenant thereof, to *Humphrey Peare*; and by an arrangement between her and Mr. *Peare*, she paid to Mr. *Cusack*, the land agent of Mr. *Alder*, the rent which Mr. *Alder* was entitled to receive out of the premises. In 1840 she complained that the house was very much out of repair, and not worth the rent reserved by the lease of 1799. In consequence of this, some arrangement was come to between the parties, the particulars of which did not appear; and in May, 1841, she paid to Mr. *Cusack* a sum of 10*l.* 10*s.*, which he accepted as and for a half-year's abated rent of the premises, up to March, 1841, due by Mr. *Peare* to Mr. *Alder*; and which reduced rent, Mr. *Alder* agreed to accept from Mr. *Peare*, for one year, in consideration of the dilapidated state of the premises. In 1841 Mrs. *Ward* purchased the interest of *Humphrey Peare* in the premises demised by the lease of 1799, and in some adjoining premises, for the sum of 50*l.*: and by indenture of the 15th of July, 1841, reciting the lease of 1799, the renewal thereof of 1827, for the two lives named in the original lease, and for the life of the Princess *Victoria*, the *new cestui que vie*, and that *Alder's* interest therein had become vested in *Kavanagh* (which was not the fact), and that *Kavanagh's* interest had become vested in *Peare*; and further reciting the title of Mr. *Peare* to the adjoining premises, he, *Peare*, assigned and conveyed the same, for all his estate and interest therein, to Mrs. *Ward* and her heirs. After the completion of this purchase, Mrs. *Ward*, in January, 1842, paid Mr. *Cusack* the sum of 10*l.* 10*s.*, which he accepted as and for one half-year's abated rent of the premises, up to September, 1841.

The original bill was filed in November, 1842, and prayed that Mrs. *Ward* might be declared to be bound to

cept a renewal; or a new lease of the premises, for the surviving life named in the lease of 1799, and for two new lives named by the plaintiff, or for such other persons as the Court might deem it expedient to name; and to execute to the plaintiff a counterpart of such renewal: and for an account of the sum due to the plaintiff for rent, renewal fines, septennial fines, and interest.

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The defendant, by her answer, denied that the plaintiff was at all entitled to the lands and premises demised by the lease of 1799, or any part thereof, for the estate, term, or interest therein conveyed by the lease of the 15th of May, 1795 (being the lease from the Earl of Meath, under which the premises were held by *John Alder* at the time when he executed the lease of 1799, one life in which was still in being); for she said that no estate or interest in said premises, other than the interest of *John Alder* in the rent of 5*l.* 10*s.*, ever became vested, nor did any right of renewal in respect of said premises ever become vested in the plaintiff: for that upon the execution of the indenture of April, 1799, all the estate and interest which *John Alder* had then owned to that time in the premises, and to which his right of renewal was incident, became vested, by virtue of said indenture (which in legal effect was an absolute assignment), in *Dominick O'Connor*; and she said that no person entitled to the premises demised by the indenture of April, 1799, was party or privy to the renewals of the 14th of August, 1827, and the 3rd of August, 1837, or required any person entitled to the receipt of the rent of 45*l.* 10*s.*, or any other person, to nominate any new lives in lieu of *cestuis que vie* who had died: and that said renewals, having been executed without the consent and concurrence of the assignee for the time being of the interest

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of *Dominick O' Connor*, were wholly without effect and inoperative.

She further said, that having in 1840 entered into possession of the premises as tenant to *Humphrey Peare*; and having with his consent made a payment on account of the rent of 45*l.* 10*s.* to the plaintiff, not as her landlord, or as the landlord of *Humphrey Peare*, but as claiming a right, not disputed by *Peare*, to receive that rent from *Peare*, whose landlord she then conceived the plaintiff to be, she, in the course of such transactions, became acquainted with Mr. *Cusack*, a barrister, the agent of the plaintiff, and to whom such payment was made; who advised and recommended her to purchase up the interest of *Peare* in the premises, representing that he considered her a more eligible tenant than *Peare* had been found to be: and that he promised her that, if she would do so, the plaintiff would, upon her surrendering *Peare's* interest, when so purchased, grant her a new lease, for a fresh term, at a reduced rent: and that she was induced by the said promises and representations, to purchase *Peare's* interest in the demised premises, and also in the adjoining premises.

These allegations were denied by Mr. *Cusack*, who deposed that he did not, previous to the defendant taking the assignment of the premises, speak to, or hold any conversation with her, in relation to her taking an assignment of the premises, to his recollection and belief. That he might have had some casual conversation with her on the subject of such purchase; but that he said and did nothing whatever to induce her to become the purchaser of the premises. He further stated, that he did not, in any conversation he might have had with her respecting her taking the

assignment, say, or represent to her, that, if she took the assignment, the plaintiff would grant her a new lease of the premises, at a rent lower than that at which *Peare* then held the same; nor did he hold out any such promise to her, or say any thing calculated to induce her to believe that she should get the premises at a lower rent: and he did not, that he never had any conversation with her respecting the plaintiff requiring her to accept a renewal of the lease of April, 1799, until after she had taken the assignment of *Peare's* interest; after which, and after she refused to perform her agreement for a new lease, and previous to the filing of the bill, he gave her to understand that the plaintiff would require her to accept a renewal of the lease of 1799, and pay the renewal and septennial fines due thereon: and that he did not advise or recommend her to take an assignment of *Peare's* interest; nor did he recollect that he ever expressed a wish that she should be the tenant instead of *Peare* for he considered *Peare* a more wealthy and more eligible tenant. There was no other evidence as to the time when the negotiation for the new lease commenced.

The defendant further by her answer said, that no immediate steps were taken for carrying into effect the agreement for the reduction of the rent, and the substitution of a new lease at the reduced rent, for the indenture of 1799. That Mr. *Cusack* having on the part of the plaintiff, in April, 1802, promised the defendant to give her a lease of the premises at a rent which should not exceed 32*l.* a year, without, however, finally determining the amount of the rent, or the duration or nature of the interest to be granted, and being at the same time promised to put the premises into complete tenantable repair and condition, provided the de-

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defendant would contribute 10*l.* towards the repairs (which repairs the defendant alleged that neither the plaintiff nor his agent had since effected, although she paid the agent the said sum of 10*l.*, which she agreed to contribute for that purpose), Mr. *Cusack*, in June or July, 1842, called on defendant, and produced to her a paper writing, which he represented to be an agreement on the part of the defendant to take a lease of the premises ; and that she, being illiterate, and wholly unacquainted with legal business and forms, and confiding in Mr. *Cusack*, signed the paper without reading it. The account given by Mr. *Cusack* of the cause of the execution of this document was different. He said that the agreement of Mrs. *Ward*, to take the new lease and surrender the old, was at first by parol ; that a lease and surrender were prepared, and she was required to execute them ; but that, finding her tardy in doing so, Mr. *Cusack* asked her to sign an agreement in pursuance of her previous contract, which she did by executing the document in question. This document bore date the 6th of May, 1842, and purported to be a memorandum and covenant of agreement between *C. F. Alder* of the one part, and *Elizabeth Ward* of the other part. After reciting that, whereas the said *C. F. Alder* having caused to be laid out and expended the sums of 26*l.* and 20*l.*, in repairing the roof of the dwelling-house wherein the said *Elizabeth Ward* then resided, and in making certain other repairs and improvements therein mentioned, as by an estimate thereof, bearing date the 26th of April last, would more fully appear ; and that *Elizabeth Ward* had applied to *C. F. Alder* to accept a surrender of her lease and interest in the said house and premises, and to grant her a new lease thereof, to which application *C. F. Alder* had assented and agreed ; it proceeded thus : “ Now I, the said *Elizabeth Ward*, do

by, for me, my heirs, executors, and administrators, undertake, promise, and agree to paper," and make certain repairs therein mentioned to the dwelling-house, "on before the 1st day of December next, and to keep the same in good order and condition; a covenant for that purpose to be introduced into the said new lease hereby agreed to be granted to me of said house and premises; and further, that I will pay all costs, charges, and expenses, attendant thereon, together with the costs of said surrender and new lease." This instrument was executed by *Elizabeth Ward* alone; and her signature to it was attested by Mr. *Cusack*. The sub-agent of the Earl of *Meath* was accidentally present when it was executed by Mrs. *Ward*. Mr. *Cusack* proposed that he read it over carefully to her before she signed it, and explained it to her fully; that she asked the sub-agent whether it was fair; and he, having read it, said he thought it was a fair agreement; upon which she signed. No copy of it was left with Mrs. *Ward*, nor was it previously submitted to any solicitor or adviser on her behalf.

Differences having arisen between Mrs. *Ward* and Mr. *Cusack*, touching the new lease, Mrs. *Ward* authorized her solicitor, Mr. *Mooney*, to act for her. The circumstances of the negotiation between him and Mr. *Cusack* are detailed in Mr. *Mooney's* evidence. By her answer, Mrs. *Ward* alleged, that not being able to come to terms, and Mr. *Cusack* having threatened to compel her to pay the rent of 45*l.* 10*s.*, she resolved to stand upon her rights, and accordingly had not since paid any part of the rent of 45*l.* 10*s.*, the plaintiff having refused to take less than the full amount of it, which she submitted she could not at law be compelled, and was in equity bound to pay; and she admitted that she had threatened to assign the premises to a pauper. She denied

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that the plaintiff, before the institution of the suit, had required her to accept a renewal, or to pay renewal fines, or had nominated new lives to her; and said that, until the bill was filed, she did not know that the plaintiff claimed the right to enforce her to accept a renewal; and submitted that, under the circumstances, she was not bound to accept the renewal.

Mr. *Mooney* deposed that in September, 1842, Mr. *Ward* called on him, and told him that she had some months previously signed a document for Mr. *Cusack*, in respect of the house in Thomas-street; and that, for certain reasons, she feared the hostility of Mr. *Cusack*, and was alarmed in consequence of having signed the document, which she said she had never read, and of the contents of which she represented that she was ignorant; and she requested Mr. *Mooney* to communicate to Mr. *Cusack*, that he had received directions from her to pay him half a year's rent, and to endeavour by that means to get an inspection of the document so signed by her. Accordingly on the 27th of September, Mr. *Mooney* wrote to Mr. *Cusack*, requesting him to appoint a time for receiving "half a year's rent of Mrs. *Ward's* holding in Thomas-street;" in consequence of which, Mr. *Cusack* shortly afterwards called on Mr. *Mooney*, and produced the memorandum of May, 1841. Mr. *Mooney*, having read it, pointed Mr. *Cusack's* attention to the fact, that neither the rent nor the term was stated in it; and complained that the defendant, who was an illiterate person, and who, until a few years previously, had been a servant, should have been permitted by Mr. *Cusack* to execute it, in the absence of any professional person on her behalf to advise her. Mr. *Cusack* said that the rent and terms of the new lease were distinctly understood between him and

he defendant ; and offered, either that the defendant should be at liberty to hold on the premises at the rent she was then liable to, viz., 42*l*. British yearly ; or to execute leases according to her agreement, and to pay up the arrears of rent due up to the date of executing the leases, only at the rate of rent reserved by the lease, viz., 32*l*. yearly ; or to take the premises off her hands altogether, she paying whatever arrears should be due at the time of surrendering same, at the rate of 42*l*. yearly. Mr. *Mooney* said that he would see Mrs. *Ward* on the subject, and would communicate with Mr. *Cusack*. He accordingly saw her, and told her the purport of the agreement, and of his conversation with Mr. *Cusack*. She said that she would not take out new leases ; and that she would rather pay the original rent for the premises, as long as it was her will and pleasure to hold them. Mr. *Mooney* communicated her objection to take out leases to Mr. *Cusack* ; and said that she would pay the year's rent at the rate of 42*l*. ; Mr. *Cusack* afterwards called on Mr. *Mooney*, on the subject of her objection to take out leases, and then produced to Mr. *Mooney* an engrossment of a new lease and of a surrender of the old lease, which had been prepared and were intended for the defendant's execution. The new lease purported to be for two lives or thirty-one years, whichever should last longest, at the yearly rent of 32*l*. ; and it contained a covenant against alienation or subletting. Mr. *Mooney* stated that the introduction of that covenant was not warranted by the memorandum of agreement, even if the lease were in other respects correct. Mr. *Mooney* did not then offer to pay the 42*l*. : and Mr. *Cusack* having afterwards applied to him for it, he positively refused to pay it.

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It appeared in evidence that, pending the negotiation be-

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tween Mrs. *Ward* and Mr. *Cusack*, for the new lease, Mrs. *Ward* produced to Mr. *Cusack* the assignment of the 15th of July, 1841, from *Peare*, as her title to the premises: upon reading it over, Mr. *Cusack* thought it was informal and objectionable; and he told Mrs. *Ward* that he would get a proper deed prepared by his attorney, at the mere costs of the stamp and registration. She assented; and a new deed was prepared by Mr. *Young*, who had previously been employed by Mr. *Cusack* as his solicitor, the draft of which was submitted to Mr. *Walker* (who had prepared the former assignment), on behalf of Mr. *Peare*. No other solicitor took part in the preparation of that second deed. It purported to bear date the 15th of July, 1841, and did not refer to the former deed of that date; in it, the recital that *Alder's* interest had vested in *Kavanagh* was omitted; the recitals being, the lease from *Alder* to *O'Connor*; that *O'Connor's* interest had become vested, subject to the rent and covenants, in *Kavanagh*; the lease of the adjoining premises to *Kavanagh*; and the assignment of all the premises by *Kavanagh* to *Peare*.

The repairs and improvements to be made by the plaintiff, which were referred to in the memorandum of May, 1842, were commenced before the execution of that document, and were completed afterwards. The whole cost of them amounted to about 54*l*.

Argument.

Mr. Sergeant *Warren*, Mr. *Brooke*, and Mr. *Hayes*, for the plaintiff.

The defendant relies upon several objections to the relief sought by the bill. (1.) She insists that the indenture of 1799 operated as an assignment; that no reversion remained in *Alder*; that none is now vested in the plaintiff, and con-

ntly, that he has no right to enforce her to renew the

But though in law there is no reversion (and that tion has been successfully relied on by the defendant, feat the plaintiff's action for the recovery of his rent), Court of Equity looks at the substance of the trans- t, and considers the relation of landlord and tenant to ill subsisting : *Fitzgerald v. O'Connell*(a) ; *John v. strong*(b). (2.) That the conduct of the plaintiff has so unconscientious, that he is not entitled to the relief it. This defence is not established by the evidence ; t, on the contrary, shows that the plaintiff's conduct een fair and proper throughout ; and that his agent has with much kindness and forbearance towards the de- nt.

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: *Monahan* for the defendant.

is is a bill to compel a tenant to accept a renewal ; in t the plaintiff must show that he has done everything red of him by the covenant ; and, moreover, that he ot been guilty of *laches* in insisting upon his right. first objection to the plaintiff's claim is, that the lives ed before the assignment of the lease to the defen- the plaintiff, therefore, never could have maintained an t for the breach of the covenant against the defendant, was broken before the assignment to her : *Church- ens of St. Saviour's v. Smyth*(c). The covenant was n at the expiration of three months from the fall of rst life. Now, where the liability of a party is alleged ise under a legal instrument, binding in a Court of a Court of Equity will not give to that instrument a

1 J. & Lat. 134.

(c) 1 Black. 351.

Ll. & G. *temp.* Plunk. 392.

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more extensive operation than it has at law : for instance, where the question arises upon a bill for a specific performance, the Court frequently directs an issue to ascertain the existence of the legal liability(a). As, therefore, the covenant to apply for a renewal and pay the fine never could have been enforced at law against the defendant, so neither can it be enforced in equity. It never can be enforced at law ; for, the right to sue for the breach committed in 1803 being gone, the plaintiff cannot sue for subsequent breaches of the covenant : *Rubery v. Jervoise*(b) ; *Whitmel v. Farrell*(c).

[THE LORD CHANCELLOR. In *Rubery v. Jervoise*, the second term of twenty years was to commence from the expiration of the term then last before granted ; it was plain, therefore, that it was not to be granted, unless the first term of twenty years had been previously granted. Here the covenant is different.]

An assignee is only bound, as between him and the landlord, to perform the covenants in the original lease, as long as he continues assignee ; *Burnett v. Lynch*(d) ; *Wolveridge v. Steward*(e) ; and the defendant may get rid of her future liability to renew by assigning over.

The *laches* of the landlord, in not calling on his tenant to renew since the fall of the life in 1802, is also a bar to the suit. The Tenantry Act only applies for the benefit of the tenant as against his landlord ; it does not enable a landlord to maintain a bill against his tenant to compel him to renew, where there has been such *laches* as, in an ordinary case,

(a) 1 Ven. & Pur. 352.
(10th Ed.)

(b) 1 T. R. 229.

(c) 1 Ves. 256.

(d) 5 B. & C. 589.

(e) 1 C. & M. 644.

would bar his remedy. If this were the simple case of a bill for the specific performance of the covenant in the lease of 1799, wholly independent of the consideration of the Tenantry Act, there is no doubt that it could not be maintained; and the Master of the Rolls was of that opinion upon the motion for a *ne exeat* in this case(a).

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Another ground upon which this bill must be dismissed is, that Mrs. *Ward* was induced to become the assignee of *Peare* by the representations of Mr. *Cusack*, that Mr. *Alder* would accept a surrender of the old lease from her, and grant her a new lease at a reduced rent. It is, therefore, a fraud in the landlord to enforce his present claim against her. The answer of the defendant, and the evidence of Mr. *Cusack*, who speaks only to the best of his recollection, are opposed to one another: but the circumstances show that the statement in the answer is correct. The first receipt for the abated rent of 10*l.* 10*s.* bears date the 1st of May, 1841; it is for the half-year's rent due the 25th of March, 1841. Mrs. *Ward* must, therefore, have been then aware that the premises were out of repair. Her purchase was in July, 1841: but it is not probable that she would have given 50*l.* for premises out of repair, and let too high, if she had not had some such understanding with Mr. *Cusack*, with respect to a new lease of the premises, as she represents. The agreement of May, 1842, was obtained from the defendant when she was *inops concilii*: by her answer she denies that she ever agreed to make the repairs mentioned in it; and it is observable, that although it recites that the money had been then actually laid out by the landlord in repairing the house, yet the evidence shows that the repairs were then only in a state of progress.

(a) 5 Ir. Eq. R. 367.

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Mr. *Brooke*, in reply, argued that the *laches* was not a bar to the suit; that the Tenantry Act was declaratory; and that the equity of the country applied as well to suits to compel a tenant to accept a renewal, as to those by tenants to enforce a renewal from their landlords: and he insisted that the covenant to renew was a continuing one; and that there was a breach of it by each successive assignee of the lands neglecting to obtain a renewal.

THE LORD CHANCELLOR directed the case to be re-argued upon the point, whether the equity declared by the Tenantry Act applied as well to suits by the landlord as to those by the tenant.

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Mr. *Brooke* for the plaintiff.

The lease contains two covenants; one by the landlord, that on the death of the *cestui qui vie* which should first happen, and within three months from the day of such death, upon payment of a fine, the lessor or his heirs naming a life in the place of the person so dying, he, the lessor and his heirs, would renew. No time is fixed for the payment of the fine. That applies to the first *cestui qui vie* who should happen to die; and there is a similar covenant with respect to the fall of the other lives. The covenant by the lessee is, that he, within three months after the death of each *cestui qui vie*, will require the landlord, his heirs and assigns, to nominate a new life; and at the same time will pay to him the renewal fine, for the better assuring the demised premises to him, the lessee, according to the true intent of the indenture; that is, for a term of three lives renewable for ever. There can be no doubt, therefore, that this amounts to a covenant by the lessee to accept a renewal; for it is not necessary that there should be ex-

ress words to constitute a covenant: *Easterly v. Samp-*
m(a); *Pordage v. Cole(b)*; *Stevenson's Case(c)*.

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Assuming, then, that there is a covenant on the part of
 the lessee to renew, the first question is, what is the effect
 of the Tenantry Act, or of the equity of the country, in this
 case? The Tenantry Act is not confined in its operation
 to the mere cases mentioned in it; it is a declaratory
 Act. That it is so was the opinion of Lord *Lifford* in
Boyle v. Lysaght(d); of Lord *Redesdale* in *Lennon v.*
Lapper(e), and *Barrett v. Burke(f)*; and of Sir *William*
St. Mahon, in *Shenton v. Corbally(g)*. Of what, then, is
 the Act declaratory? Lord *Lifford* says it is of a local equity,
 and, as it has been often called, the old equity of the King-
 dom. Lord *Redesdale* observes (in *Barrett v. Burke*),
 that the true meaning of the Act is to declare what was the
 equity of Ireland before the Statute: and in *Lennon v.*
Lapper he says: "I understand the Act, therefore, only to
 have declared, that in certain cases Courts of Equity had
 relieved against mere neglect; that it was fit they should
 continue to do so; and that it was proper there should be
 the same rule in future as to what should be considered mere
 neglect:" and, after discussing some cases, he adds: "Upon
 looking into the cases, it seems to me that they were per-
 fectly well decided, and consistent with the provisions of the
 Act. The Courts here had relieved, in cases of this kind,
 on principles equally applicable and frequently applied to
 other cases." The whole of this part of the judgment of
 Lord *Redesdale*, has an important bearing on this case:

a) 6 Bing. 644.

(e) 2 Sch. & Lef. 682.

b) 1 Saund. 319.

(f) 5 Dow. 1.

c) 1 Leon. 324.

(g) 1 Hog. 403.

d) 1 Ridg. 384; s. c. Vern. & Scr. 135.

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he says that Courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that or other circumstances could not maintain an action to recover damages at law : and adds, that in cases of covenants for renewal, time is not essential ; for that the main object of fixing a time is to preserve the tenure and the remedies for the rent and the fine, where it is more than nominal ; and that, if those are preserved, the substance of the contract is performed, though the letter of the contract may not be preserved. The doctrines there laid down apply generally to all cases where time is not of the essence of the contract ; and they have been approved of by *Richard*, C. B., in *Maxwell v. Ward*(a). *Lord Kensington v. Phillips*(b) is a strong case, showing how far the Court will go in decreeing specific performance, notwithstanding the *laches* of the plaintiff. The question then arises, is the old equity of the Kingdom, of which the Act is declaratory, confined to the case mentioned in the Act ? Clearly not. The Act recites that much land in the kingdom is held under leases for lives, with covenants for perpetual renewal, upon payment of certain fines at the times therein mentioned for each renewal ; and the Act in terms relates to *such leases* and *such tenants only*. Nevertheless, leases for lives renewable, upon which no fine has been reserved ; leases for years terminable upon lives, with covenants for perpetual renewal ; and leases for years, renewable for ever, have been held to be within the equity of which the Act is declaratory : *Boyle v. Lysaght*(c) : *Kean v. Strong*(d). If then the tenant has, upon the local equity, a right to relief

(a) 11 Pri. 17.

(b) 5 Dow. P. C. 61.

(c) 1 Ridg. P. C. 384, 416.

(d) 5 Ir. Law R. 540.

notwithstanding his *laches*, the landlord, in a similar case, must have the same right. All equities have their origin in contracts expressed or implied; and if a contract is to be understood in a certain sense for the benefit of one of the parties to it, it must be understood in a like sense for the benefit of the other party. Thus, in *Furnival v. Crewe*(a) —a suit for a renewal—Lord *Hardwicke* says: “I agree that the two covenants, one on the part of the lessor, and the other of the lessee, must be commensurate with one another; and therefore, if a breach might be assigned at law, either against lessor or lessee, the question is, whether this is a proper case for relief in equity; and there is no doubt but it is.” This shows that the remedies in such cases are mutual; and *Allen v. Hilton*(b) is to the same purpose. Here, the plaintiff may, to-morrow, bring an action against the defendant on the covenant to renew and pay the fines: *Lopdell v. Creagh*(c). The cases of *Rubery v. Jervoise*(d), *Eaton v. Lyon*(e), and *Maxwell v. Ward*(f), which appear to be contrary, were decided upon the construction of the particular covenants in these cases, and not upon any general rule. And such an action lies against an assignee; for by the 11 Anne, c. 2, s. 3, Ir., the assignee of the lessee is liable upon the privity of contract; *Grogan v. Magan*(g); *Lord Egremont v. Keene*(h). But at least, the plaintiff has still a remedy upon the covenant against *Peare* for not renewing; Bac. Abr. Covenant E. 5; *Treackle v. Coke*(i); and if so, then, in the words of Lord *Hardwicke*, in *Furnival v. Crewe*(k), “This is a

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(a) 3 Atk. 87; S. C. 9 Mod. 446.

(b) 1 Fonb. Tr. Eq. 432.

(c) 1 Bli. N. S. 260.

(d) 1 T. R. 229.

(e) 3 Ves. 690.

(f) 11 Pri. 3.

(g) Al. & Nap. 366.

(h) 2 Jo. 307.

(i) 1 Vern. 165.

(k) 3 Atk. 87.

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covenant which binds the lands in a Court of Equity, and therefore, gives the relief against the proper person who is in possession of the land, as it has a lien upon it." There is no case in which this Court has refused to give relief by decreeing a specific performance, where an action at law might be maintained upon the covenant.

Mr. *Monahan*, for the defendant, contended, that there was no trace of such a local equity as that contended for: that the recital and provisions of the Tenantry Act being confined to cases of suits by tenants against their landlords for renewals, would seem to indicate that no such local equity existed: that as to the want of mutuality, the equity was established in favour of tenants only; and that the *dictum* of Lord *Hardwicke* in *Furnival v. Crewe* did not apply to a case like this, where the legal remedy lay against one person, and it was sought to enforce the equitable relief against another.

Judgment.

THE LORD CHANCELLOR:—

As to the conduct of the parties, the case stands thus: Mr. *Alder* held, under Lord *Meath*, by lease for lives, with covenant for perpetual renewal, and Mr. *Peare*, as assignee of Mr. *O'Connor*, held under Mr. *Alder* for lives, with covenant for perpetual renewal; and the tenant also covenanted to accept the renewals, at a rent of 45*l.* 10*s.* Mrs. *Ward* recently held under *Peare* as, I presume, tenant from year to year. The property being in a state of dilapidation, Mr. *Alder*, by his agent, Mr. *Cusack*, thought proper to reduce the rent for one year to twenty guineas. The first receipt is on the 1st of May, 1841, for ten guineas for half a year's

it to the 25th March, 1841. That was whilst Mrs. *Ward* is under-tenant, and it was paid by her: the other is dated the 20th January, 1842, for the like amount, due 29th September, 1841. Mrs. *Ward* purchased Mr. *Peare's* interest, which was conveyed to her on the 15th July, 1841, for 50*l.* At that time but one life was living; but neither *Connor* nor *Peare* had ever been called upon to renew, though one life had dropped in 1802, and another in 1834.

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On the 5th May, 1842, Mr. *Cusack* obtained from Mrs. *Ward* an agreement, which recited that she had applied to Mr. *Alder* to accept a surrender of her lease, and to grant her a new lease, to which he had assented. She is then made to covenant to do certain repairs, and to keep the premises in repair, pursuant to a covenant to be contained in the lease; and that she would pay all costs of the new lease, surrender, &c. Mr. *Cusack* is the attesting witness. Mr. *Cusack* then finds fault with the conveyance from Mr. *Peare* to Mrs. *Ward*, but upon what special grounds does not appear; and procures a new conveyance to be prepared by his own solicitor, and to be laid before counsel on behalf of Mr. *Peare*; and that is made to bear date the 15th July, 1841, the same as the original deed, to which no reference is made, although the later deed could not have been executed before the latter end of September.

Mr. *Cusack* had then two deeds prepared; one a surrender by Mrs. *Ward* of the existing lease, and the other a new lease from Mr. *Alder* for two lives and thirty-one years, at a year, and with a general clause against alienation without Mr. *Alder's* consent. The parties disagreed about terms; and ultimately this bill was filed by Mr. *Alder*

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for a specific performance of the covenant for renewal in the lease to *O'Connor*, which was conveyed to *Pearce*, and by him to *Mrs. Ward*.

The reduction of the rent during *Mr. Pearce's* time, although he was not entitled to any reduction under the lease, proves that *Mr. Alder* was willing to relinquish some of the rights to which he was entitled; and it is proved that he was willing to assist in repairing the premises, in order to put an end to any further claim for abatement of rent. *Mrs. Ward*, who, whilst undertenant, paid a half-year of the twenty guineas rent, was of course aware of the abatement. She, by her answer, represents that she purchased *O'Connor's* lease upon the faith of *Cusack's* promise to grant her a new lease at a reduced rent. She then alleges a promise by him in April, 1842, to give her a lease at a rent not exceeding 32*l.*, without the amount having been fixed, or the extent of the interest; and that he would repair the premises if she would contribute 10*l.*, which she did: and she says that she took the transfer from *Pearce* with the distinct understanding that she would not be required to accept a renewal under the covenant in the lease to *O'Connor*.

On the part of the defendant it was argued, that if, by the rules of the Court, she would have been bound to renew, yet she is exonerated from that liability by the conduct of *Mr. Cusack*, as the agent of *Mr. Alder*. On the other side it was insisted that the agreements between *Mr. Cusack* and the defendant were void; that she had repudiated them, and the plaintiff was entitled to proceed against her, as the owner of the lease to *O'Connor*, for a renewal. The agreement for a new lease at a reduced rent, which is not denied, was by parol; and it is clear that the terms were not settled.

Mr. *Cusack* in his evidence says, that finding the defendant tardy, he required her to execute the agreement of the 3rd May, 1842. She says that she did not read it; and if it was read to her, she could not have understood it. The statement that the repairs had been done is not correct, as he himself proves that they were then only partially executed. He says that a sub-agent of Lord *Meath's* was present, and that she appealed to him, and he said it was a fair agreement. But no such person is examined; and if he did say so, that would only prove his incompetency to advise her: for neither the term to be granted, nor the rent to be paid, was stated, nor did the landlord enter into any contract by the instrument, or execute it. It was obtained from her by Mr. *Cusack*, a barrister, and agent for the landlord, without any assistance on her part, and was witnessed by Mr. *Cusack*; and she was not furnished with any copy or extract of it. But it was so inaccurately framed that it was simply void. Under this agreement, however, the proposed surrender from Mrs. *Ward*, and the actual lease from Mr. *Alder*, were prepared. She clearly was not bound to execute the one or accept the other. The terms of the new lease were not such as she ever agreed to accept.

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But although she was not bound to accept the lease actually executed by Mr. *Alder*, the question still remains to be considered, whether she was bound to renew under the tenant's covenant in the lease to *O'Connor*. There are in favour of her statement, that she accepted the conveyance from *Peare* with the distinct understanding that she was to be bound so to renew, several circumstances, viz.: the non-enforcement of the covenant against *O'Connor*, although the first life dropped in 1802; or against *Peare*, who is represented by *Cusack* to have been a more solvent

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person than the defendant, although the second life died in 1834 ; the abatement of the rent ; the agreement, although informal and imperfect, actually made between *Cusack* and the defendant ; and the deeds of surrender, and new lease, prepared and executed. If it had been intended to enforce the covenant for renewal, it certainly should have been enforced against *Peare* before he conveyed away the property. It was insisted upon, on the part of the defendant, that Mr. *Cusack's* object throughout was to bind Mrs. *Ward* by the original covenant, so as to force her to accept a new lease. This was an object of consequence to the landlord, as from the frame of his lease to *O' Connor* he had no reversion left in him, and found it difficult to recover his rent or enforce the covenant in the lease. Mr. *Peare*, a solvent person, is allowed an abatement of rent, and no attempt was made to enforce a renewal against him. But now that Mrs. *Ward* stands in his place, a renewal at the original rent is required. I believe that Mr. *Cusack*, who is a young man, was influenced by a desire to promote the interests of his principal ; but he should not have communicated with the defendant, or obtained her signature to any instrument, without the intervention of any professional man on her behalf. Upon his cross-examination it came out that he had advised her to have a new conveyance from Mr. *Peare*, which his attorney would prepare, and she should be charged only for stamps and registration ; and, accordingly, the new deed was prepared and executed, but still without any advice on her behalf. Mr. *Peare* had his counsel ; Mr. *Alder* had his ; and Mrs. *Ward*, a shopkeeper, and recently a servant, was left to take care of her own interests. The new deed professes to be an original. I cannot too strongly express my regret at such a proceeding. One deed, in a *boná fide* transaction, ought never to be substituted for another, without a state-

in the new one of the old one, and of the reason for the institution. Without such precautions there is no safety les; although I do not think that what is termed fraud intended in this case. Mr. *Cusack*, I have stated, does mention why he procured a new deed from Mr. *Peare*. Comparing the two deeds, it is plain that he intended benefit Mr. *Peare* at Mrs. *Ward's* expense. I think he intended to clear away any difficulties in enforcing, if necessary, the acceptance of a renewal by her. The conveyance which Mrs. *Ward* had actually obtained from Mr. *Peare*, and with which Mr. *Cusack* ought not to have interfered, recited a lease of August, 1827, from Lord *Meath* to *Alder*, adding the life of the Queen, then Princess *Victoria*, in lieu of the one which dropped in 1802; and it recited that *Alder's* right in the premises and the renewal were vested in *Kavanagh*. He then stated the conveyance from *Kavanagh* to *Peare*, referring to all the deeds; and then *Peare* conveyed to Mrs. *Ward* for all the lives and estates. Now it does not appear that *Kavanagh* did obtain *Peare's* interest in the renewal, or convey it to *Peare*: but *Peare* after so stated his title and conveyed it; and Mr. *Cusack* was not justified in taking from Mrs. *Ward* the benefit of what was thus conveyed to her, as between her and *Peare*: nor ought she to have paid for stamps or parchment to correct a mistake not made by her, and wholly to her disadvantage. The new deed avoided these errors, and recited the lease to *O'Connor*, and that it became vested in *Kavanagh*, who conveyed to *Peare*; so that she had no claim under it, as against *Peare*, to hold for the life of the Queen. Even after Mrs. *Ward* had consulted her present solicitors, and they had refused to allow her to accept the lease, yet no demand was made on her, through them, for a renewal before the filing of this bill: but Mr. *Cusack's*

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evidence, when closely examined, shows that he only gave her to understand, after he had seen her solicitor, that a renewal was required. This hardly looks like an intention to compel a renewal; and certainly, after forty years' acquiescence in the breach to renew, is not the proper mode to proceed before filing a bill. Upon a full review of all the facts, I think that the defendant was induced to purchase upon an understanding with Mr. *Cusack*, that she was to have a new lease at a reduced rent, and was not to be called upon to accept a renewal under the old covenant, at the old rent. Mr. *Cusack* did not put forward the claim to such a renewal until after he had substituted one deed for another, and that the agreement he had procured Mrs. *Ward* to sign had failed to lead to the new arrangement which he contemplated. That new arrangement is now repudiated by both parties; and both parties desire to stand upon their rights under the old lease, with this exception only, that Mrs. *Ward* desires not to be bound by the covenant to renew. Mr. *Cusack*, before the filing of the bill, offered several terms to Mrs. *Ward*, one of which was, that she should hold on at the old rent of 45*l.* 10*s.*; which clearly implied that she was not to be bound to renew. That, in effect, will be my decree, as I shall dismiss this bill, and leave her to hold under the original lease.

In the preceding observations I have assumed throughout that the landlord has a right to enforce this renewal against his tenant, and I have heard a very able argument upon that question; but that argument has failed to convince me that the landlord has the right. The equity in this country is one which has been called local: it is not universal; it is not inherent; and though it has been considered in some of the cases that the Tenantry Act is a declaratory Statute, it

is so only of the local equity, which does not prevail in England. It, therefore, is not founded upon the general rules of equity; but it has sprung up in this country alone, and has become the law of the country. Its object, and that of the Tenantry Act, was only the relief of the tenant, not that of the landlord. There is no mutuality in that respect; and in fact it is found that, in the majority of cases, the right of enforcing a renewal is given to the tenant, and there is no obligation imposed on the tenant to take a renewal. It has been stated truly, that there are mischiefs which have been held to be within the Act, although not expressly provided for by it; but it will be found that they are within the equity and intention of the Statute. I therefore do not find fault with the extension of the Act to those cases; but the decisions are not authorities for the extension of the Act to cases beyond the mischief intended to be remedied; or to the case of a landlord who did not choose to enforce the renewal against his tenant. The landlord may speculate, if he choose, upon the chance that his tenant will not renew. He may enforce the renewal against his tenant; it may be his interest not to enforce the covenant, in order to obtain his estate free from the obligation to which it was subject. When the tenant does not desire to renew, and the landlord suffers a considerable time to elapse before adopting measures to compel the tenant to renew, much hardship to the tenant may be the result. Here the demised premises have become dilapidated; and if the landlord, after being by for more than half a century, could select the person against whom he will proceed to enforce a renewal, look to the mischief which may arise. The person, upon whom the obligation to renew rests at law, is not the person whom he is pursuing in this Court. The landlord has slumbered his rights for forty years; has not attempted to enforce

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the renewal against the person who was liable at law to renew ; and now says, that he has a legal remedy against persons who have long since ceased to have any interest in the property. Let him pursue that remedy. I do not say what would have been the case if the persons now legally liable were the persons now in possession of the estate ; but the landlord has allowed successive ownerships to take place, without seeking to enforce his claim. Without adverting to the strong circumstances of this case, it is, I may observe, one in which the landlord has, by his agent, assented to the transfer of this estate to the defendant, forty years after the dropping of the life and the breach of the covenant.

I consider this to be a case in which the landlord had lost his right to enforce a renewal as against *Pearce* ; and this relieves me from the only embarrassment I experienced, which was, what I should do with the costs of the case ; for Mrs. *Ward's* conduct in the case has not been quite correct : she was liable to pay the rent ; and, knowing the difficulty in the way of the landlord's recovering it, refused to pay it. If I could have refused her the costs, I would ; and I heard the argument upon the legal right of the landlord, for the purpose of deciding the question of costs ; but as I am satisfied that the landlord has not a right to enforce the renewal under the circumstances, I cannot take the conduct of the defendant into consideration, or refuse her the right she now has to have this bill dismissed with costs.

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HARPUR v. BALL.

MRS. Harpur, being entitled to the sum of 1500*l.*, the one-third of a sum of 4500*l.*, charged on certain lands by the settlement executed on the marriage of her parents, the present bill was filed by her and her husband to raise its amount. The defendant paid the money into Court.

Mrs. Harpur eloped with her husband, a few days after he attained her age of twenty-one years. No settlement was executed upon her marriage, or since. It was alleged by **Mrs. Harpur** that **Mr. Harpur** was a merchant, possessed of freehold property and in receipt of an income exceeding 100*l.* a-year; and that he had threatened to leave her wholly unprovided for at his decease: and she offered to waive her equity to a settlement if a proper provision was made for her by her husband. These facts were not denied by **Mr. Harpur**; but he said, as was the fact, that he and his wife lived together, and that he maintained her suitably to her station in society; and he declined to make a settlement of his own property upon her. Under these circumstances **Mrs. Harpur** insisted upon a provision being made for her out of the 1500*l.*; and as she and her husband could not agree upon the terms of the proposed settlement, it was, by consent order made in the cause, referred to the Master to approve of a fit and proper settlement to be executed.

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Husband and wife agreed to refer it to the Master to approve of a proper settlement to be executed of a sum of 1500*l.*, money in Court, the property of the wife. The Court would not adopt a settlement whereby 30*l.* per annum was given to the separate use of the wife for her life; it appearing that the husband and wife lived together, and that he maintained her suitably: but the Master having approved of a clause giving the principal of the money, in the event of there being no children, to the husband and wife, jointly, the Court would not alter that provision.

Mrs. Harpur proposed that the entire sum should be vested in trustees, upon trust, for her separate use for life;

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and after her decease, as she should by will appoint. Mr. *Harpur* proposed that the interest of the fund should be settled on himself for life, or until he should become a bankrupt or insolvent, or should compound with his creditors; and in either of these events, that the interest should be paid to his wife, during their joint lives, to her separate use; and after his decease, in case there should be children of the marriage, that the principal should go to the children; but in case there should be no children, that the principal should go to the survivor of husband and wife absolutely. By the settlement approved of by the Master, the fund was vested in trustees, upon trust, during the joint lives of the husband and wife, to pay 30*l.* per annum, out of the interest, to the wife for her separate use; and to pay the residue of the annual interest to the husband; and, upon the death of either of them, to pay the interest to the survivor for his or her life; and after the decease of the survivor, to divide the principal amongst the children of the marriage, as the husband and wife jointly, or, in default, as the survivor of them, should appoint; and in default, equally among them and in case there should be no children of the marriage then to pay and transfer one-half of the fund to the husband and his executors, &c., and to pay and transfer the other half of the fund as the wife should appoint, and, in default of appointment, to her executors, &c.

Mr. *Harpur* objected to the report, insisting that no part of the interest of the fund ought to be settled to the separate use of his wife, during their joint lives; and also that, in case there should be no issue of the marriage, the principal money ought to go to the survivor of husband and wife absolutely.

The Master of the Rolls having overruled the objections,

Mr. *Harpur* renewed his application, by way of appeal from the order of His Honor.

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Mr. *Monahan* and Mr. *Maley* for Mr. *Harpur*.

This is not a case of contempt, nor has the husband abandoned his wife. Under such circumstances, the wife is not entitled to have the entire fund put into settlement: *Coster v. Coster*(a). The husband, however, does not, in his case, object to that course being pursued; but he says that no part of the fund ought to be settled to the separate use of the wife during their joint lives. All the cases where such a settlement has been made, were cases where the husband had misconducted himself, either by abandoning his wife, or compelling her to live separate from him; they were cases of contempt: *Watkyns v. Watkyns*(b); *Oxenden v. Oxenden*(c); *Macauley v. Philips*(d); *Bullock Menzies*(e); *Duncan v. Duncan*(f).

Mr. *Ball* for Mrs. *Harpur*.

The reference is founded on consent; the Master is in the nature of an arbitrator, and his adjudication is final. The Court has a discretion to mould the limitations of the settlement according to the circumstances of each case; and where the circumstances warrant the provision for the separate use of the wife: *Beresford v. Hobson*(g).

THE LORD CHANCELLOR :—

This is a miserable contest between a husband and wife. Judgment.

(a) 9 Sim. 597.

(b) 2 Atk. 96.

(c) 2 Vern. 493.

(d) 4 Ves. 15.

(e) 4 Ves. 798.

(f) 19 Ves. 394.

(g) 1 Mad. 362.

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The consent upon which the matter was referred to the Master does not bind the parties to acquiesce in his decision, and the Master has acted upon that view of it; for he has made a report approving of a settlement which he considers to be authorized by the peculiar circumstances of the case; but he adds that, if it be not, his report may be altered so as to come within the authorities. Therefore he did not assume that he had authority to approve of a settlement without appeal.

I will not interfere with the manner in which he has thought proper to settle the reversionary interest in the fund: the Master has approved of it; and no sufficient objection having been made to it, I will not alter the draft in that respect. But the other point involves matter of principle; and though the property is of very small amount, I must deal with it accordingly.

This is not a case of desertion, or insolvency of the husband; nor is it of that class of cases to which it has been likened, in which the husband is claiming the property of his wife, and is called on to make a provision for her out of it. In such a case the husband demands the fund; and the Court compels him to do equity, and enforces against him the right of the wife to a provision for the maintenance of herself and her children, out of the fund. This is not that case. The lady, being of full age and mistress of her actions, nevertheless thought fit to elope with her husband; and, the marriage having taken place, both parties agree that there shall be a settlement made of this fund, and to refer it to the Master to approve of the form of the settlement. This is not, therefore, a settlement, to be made on the ground of the husband demanding the fund, and the Court enforcing

the wife's equity against that demand ; but it is a case in which both parties agree that the whole fund shall be settled. The question, then, is, what is the rule of the Court as between husband and wife, where the whole fund is agreed to be settled ? I never knew an instance of pin-money being given upon a trifling property like this. It may be where the property is large ; but to give a pin-money of 30*l.* a-year, where the whole annual income of the fund is only about 40*l.* a-year, is unprecedented. I am therefore obliged to direct the settlement to be amended ; and to order that the whole fund be settled on the husband for life, and afterwards on the wife for life ; and in other respects let the report be confirmed.

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WILLIAMS v. ATKYNS.

BY indenture of the 28th of February, 1794, *Henry Earl of Barrymore* granted and released certain lands therein mentioned unto *Sir John Lade* and *John Claridge* and their heirs, to the use that *Charlotte Countess Dowager of Barrymore*, and her assigns, should from time to time, yearly,

June 13, 14.

contained a clause empowering *B.* to determine and revoke the assignment upon repayment of the principal sum of 2275*l.* and discharge of all arrears of the annuity, "and all proportion of such annual and increased premium as after-mentioned to be paid by *A.* to the Hope Assurance Company, if any shall be so paid : " Provided that whereas *A.* had assured, or agreed to assure, the life of *B.* for the sum of 2275*l.*, the annual premium for which was payable in advance at the beginning of each year, it was agreed that, if such above-mentioned redemption should take place at any time after the premium should have been paid for the then current year, then *B.* would repay to *A.*, at the time of such redemption, the full proportion of such premium which should belong to such part of the current year as should be then unexpired, whether *B.* should require the policy of assurance to be assigned to her or not. And *B.* covenanted to repay *A.* all extraordinary expenses of insurance occasioned by her going beyond Europe.

A. effected a policy of assurance on the life of *B.* for 2275*l.*

Held,—That *B.* was entitled, upon repurchase of the annuity, to an assignment of the policy.

B., in consideration of 2275*l.*, assigned an annuity upon her own life, charged upon the estates of *X.*, to *A.*; and covenanted for the payment of it. The deed

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during her life, receive an annual sum or rent-charge of 325*l.* of the late currency, equivalent to 300*l.* of the present currency, payable quarterly on the 25th of March, &c., out of and charged upon the lands and tenements so granted.

In September, 1794, the Countess Dowager of *Barrymore* married *John Matthew Williams*. By indenture of the 7th of November, 1812, made between *John M. Williams* and the Countess of *Barrymore* of the first part; *Sir John Lade* and *John Claridge* of the second part; and *Harriet Westrop Atkins* of the third part; after reciting the indenture of February, 1794, the marriage of the Countess of *Barrymore* with *John M. Williams*, and that by virtue of that marriage *John M. Williams* was entitled to receive and enjoy to him and his assigns, the said annuity of 325*l.*, during the life of the Countess of *Barrymore*, in as full and ample a manner as the Countess before her marriage could or might enjoy the same under the indenture of February, 1794; it was witnessed that *John M. Williams* and the Countess of *Barrymore*, and also *Sir John Lade* and *John Claridge* by their desire, in consideration of the sum of 2275*l.* late currency, to the said Countess of *Barrymore* and *John M. Williams* paid by *Harriet Westrop Atkins*, granted and released to *Harriet Westrop Atkins*, her heirs and assigns, the above-mentioned annuity or yearly rent-charge of 325*l.*; to hold the same for the life of the Countess of *Barrymore*: and *John M. Williams* and the Countess of *Barrymore*, his wife, covenanted with *Harriet W. Atkins*, that they would from time to time pay to *Harriet W. Atkins*, her heirs, executors, &c., the said annuity or yearly rent-charge of 325*l.* during the life of the Countess of *Barrymore*. The deed also contained the following clauses for the repurchase of the annuity: “ Provided always, and it is hereby declared,

ed, and understood, by and between the parties to these
 ents, that in case the said *John M. Williams*, his heirs,
 cutors, administrators and assigns, shall, at any time after
 expiration of seven years from the date hereof, be
 ded and desirous to determine and revoke the hereby
 cuted assignment of the said annuity of 325*l.* sterling,
 shall on any one of the above-mentioned days of pay-
 nt of the said annuity, at any time after the expiration of
 said term of seven years from the date hereof, give six
 rms' notice in writing, under his or their hands and seals,
 he said *Harriet W. Athyngs*, her heirs, executors, admi-
 nistrators or assigns, that then and in such case, on repay-
 nt of the above-mentioned principal sum of 2275*l.* ster-
 g, and discharge of all arrears of the said annuity up to
 next day of payment immediately following the day of
 repayment of the said principal sum of 2275*l.* sterling, as
 resaid, together with all costs and expenses to which the
 d *Harriet W. Athyngs*, her heirs, executors, administrators
 assigns, shall have been put in the receipt and reco-
 y of the said annuity, and all proportion of such annual
 increased premium as hereinafter mentioned to be paid
 er or them to the Hope Assurance Company, if any shall
 o paid,—this assignment of the above-mentioned annu-
 hall cease, and the said annuity be no longer paid or pay-
 unto the said *Harriet W. Athyngs*, her heirs, executors,
 ministrators or assigns, anything herein contained to the
 rary notwithstanding. Provided also, nevertheless, that
 reas the said *Harriet W. Athyngs* hath assured or agreed
 ssure, with the Governor and Directors of the Hope As-
 surance Company, the life of the said *Charlotte Countess*
 wayer of *Barrymore*, for and during the whole life of the
 d *Charlotte Countess Dowager of Barrymore*, for the
 nicipal sum of 2275*l.* sterling, being the consideration-

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money paid by the said *Harriet W. Athyns* to the said *John M. Williams* and *Charlotte Countess Dowager of Barrymore*, for the transfer and assignment of the herein-recited assigned annuity; and whereas the annual premium for the said assurance amounts to the sum of 64*l.* 19*s.*, British, which sum is, by the policy of the said assurance, to be paid by the said *Harriet W. Athyns* to the said Hope Assurance Company yearly and every year during the life of the said *Charlotte Countess Dowager of Barrymore*, in advance at the beginning of each year, that is to say, on each and every twentieth day of October during said term: it is further covenanted and agreed by the said *John M. Williams*, for himself, his heirs, executors, administrators and assigns, that if such above-mentioned redemption shall happen to take place at any time after the above-mentioned premium or yearly payment shall have been made by the said *Harriet W. Athyns*, her heirs, executors, administrators and assigns, to the said Hope Assurance Company, for the then current year, then and in such case, the said *John M. Williams*, his heirs, executors, administrators or assigns, shall repay to the said *Harriet W. Athyns*, her heirs, executors, administrators or assigns, at the time of such redemption, the full proportion and part of such annual premium as shall have been so paid by her or them, for and on account of the said assurance for such current year, as shall or may belong to such part of such current year as shall be then unexpired, whether the said *John M. Williams*, his heirs, executors, administrators or assigns, shall require the said policy of assurance to be assigned to him or them by the said *Harriet W. Athyns*, her heirs, executors, administrators or assigns, or whether he or they shall not require the same. And provided also, that if the said *Charlotte Countess Dowager of Barrymore* shall at any time hereafter during her life, or

ing the continuance of this assignment of the said annuity quit Europe, whereby and by reason whereof, the said *Harriet W. Atkyns*, her heirs, executors, administrators or assigns, shall be put to any extraordinary expenses by assurance for the life of her, the said *Charlotte Countess Dowager of Barrymore*, that the said *John M. Williams* and *Charlotte Countess Dowager of Barrymore*, his and her heirs, executors and administrators, shall repay yearly and every year during said term or terms all such extraordinary expenses as the said *Harriet W. Atkyns*, her heirs, executors, administrators or assigns, shall be put to in respect thereof, within thirty-one days after the said *Harriet W. Atkyns*, her heirs, executors, administrators or assigns, shall have paid the same; and that the said *Charlotte Countess Dowager of Barrymore* shall not nor will not, at any time hereafter during the continuance of the said assignment, quit Europe, without the privity, license, and consent of her the said *Harriet W. Atkyns*, her heirs, executors, administrators or assigns, or without acquainting the Governors or Directors of the Hope Assurance Company, or such other Company with which the assurance shall be effected with, in writing, under their hands and seals, first had and obtained." *John Williams* executed to Miss *Atkyns* his bond and warrant in the penal sum of 3000*l.*, as a collateral security for the deed of assignment of the annuity; upon which judgment was entered in Michaelmas Term, 1812. The lands, subject to the rent-charge, afterwards became vested in Lord *Doneraile*.

In the early part of 1837 *John M. Williams* desired to repurchase the annuity, and various communications on the subject took place between him and the agent of Miss *Atkyns*, for an amicable adjustment of their rights.

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Shortly previous to the 25th of March, 1837, *John M. Williams* caused two notices under the hands and seals of himself and the Countess of *Barrymore*, to be left for *Harriet W. Athyns* at her usual place of residence; one, dated the 7th of March, 1837, stating that they would determine and revoke the indenture of the 7th of November, 1812, at the expiration of six months from the 25th day of March, 1837; and would at that time repay to her the principal sum of 2100*l.* present currency, being the same sum as would have produced 2275*l.* of the old currency of Ireland in the indenture mentioned; and discharge all, if any, arrears of the annuity of 325*l.*:—and the other, dated the 25th of March, 1837, stating, that they intended, on the 29th of September then next, to redeem and pay her the consideration received by them for the annuity; and that, on payment of the said consideration, and all legal expenses incurred, they would require her to re-assign and deliver over all the securities held by her respecting the annuity, together with a policy of assurance effected with the Directors of the Hope Assurance Company Office in London; they paying, at the same time, all sums paid by her on the policy for the current year, above the annuity received by her.

In reply to this notice, *John M. Williams* received a letter from Mrs. *Raustorne*, the niece of Miss *Athyns*, dated the 29th of March, 1837, stating that she had just forwarded to *Edmond Swift*, Esq., the conditions on which Miss *Athyns* would immediately give up the annuity to him, “namely, your own proposition to repay the purchase-money, 2100*l.*, and the two quarters up to September next, first paying 300*l.* costs of Chancery suit. The policy she keeps for herself, having paid 1650*l.* for it.” This letter was written and sent with the privity of Miss *Athyns*.

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Miss *Atkyns* having refused to execute an assignment of the annuity and policy of assurance, *John M. Williams* and *Edy Barrymore* filed their bill against her and Lord *Donetsk*, stating that no more than 1860*l.* had been received of them on account of the consideration-money mentioned in the deed of assignment; and charging that Miss *Atkyns* had concealed herself for the purpose of avoiding the service of the notices; and praying that, upon payment of what remained due on account of the said sum of 1860*l.*, together with all costs and expenses to which Miss *Atkyns* might have been put (if any) in the receipt and recovery of said annuity, and all proportions of such annual and increased premium as in the deed of the 7th of November, 1842, mentioned, the plaintiff might be let in to redeem the annuity; and that, upon payment thereof to Miss *Atkyns*, she might be ordered to execute a re-assignment or re-vesting of said annuity, and also to execute to *John M. Williams* an assignment of said policy of assurance; and that the plaintiffs might be decreed to have refunded to them or one of them, all moneys of the annuity received by Miss *Atkyns* next after the date immediately succeeding the expiration of six months after the service of the notices, together with interest thereon from the respective days on which the same became payable; and that, in the mean time, Miss *Atkyns* might be restrained from receiving any further portion of the annuity, or from taking any proceedings for the recovery of the same; and that Lord *Donetsk* might also in the mean time be restrained from paying to the defendant, Miss *Atkyns*, or to any person on her behalf, or for her use and benefit, the said annuity, or any part thereof; and for an account of what was due to the defendant, Miss *Atkyns*, on foot of the said sum of 50*l.*, or any other sum due on foot of the deed of the

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7th of November, 1812, and also of any sums properly due to her on foot of the policy of assurance, and also of all the gales of the annuity received by her subsequent to the gale immediately succeeding the expiration of six months from the date of the service of the notice of the 25th of March, 1837.

Miss *Atkins* answered, insisting that the transaction of 1812 was a purchase of the annuity, and not a loan; stating that the purchase-money was duly paid; denying due service of the notice to determine the annuity; and submitting that *John M. Williams* ought to have tendered to her the amount of the redemption-money upon the expiration of the six months' notice.

The parties went into evidence at great length, touching the payment of the consideration-money, and the service of the notice to repurchase the annuity; but at the hearing, the plaintiffs abandoned their claim to an account of the consideration-money received by them; and the defendant did not insist on the objection set up by her to a recovery of the annuity: so that the only question was, whether the plaintiffs were entitled to an assignment of the policy of assurance.

The plaintiffs gave in evidence an account of the application of part of the purchase-money, rendered to them by the agent of Miss *Atkins*; from which it appeared that a sum of 21*l.* had been deducted out of the purchase-money for the "proportion of assurance agreed to be left in hand." There was no evidence of the existence of any such agreement.

Mr. *Moore*, Mr. *Brewster*, and Mr. *Mara*, for the plaintiffs.

Mr. Sergeant *Warren* and Mr. *Armstrong* for the defendants.

Law v. Warren(a) was cited.

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Argument.

THE LORD CHANCELLOR :—

There cannot be a question whether Miss *Atkyns* is bound to reconvey the annuity ; the only question is, to whom was the policy of assurance, the premiums on which were paid out of the annuity, belong. This was an existing annuity at the time of its assignment, to which the assignee came entitled for her own benefit ; and if she choose to insure the life of Lady *Barrymore*, she would, if there were nothing more in the case, be entitled to the policy of assurance for her own benefit. But in the assignment of the annuity there is a power to repurchase it at the expiration of seven years, upon payment of the sum of 2275*l.* and all arrears of the annuity ; and also upon payment of all proportion of such annual and increased premium, as therein mentioned to be paid by Miss *Atkyns* to the Hope Assurance Company, if any should be so paid ; thus making the payment of that proportion of the premiums one of the conditions of repurchase : and then comes a proviso, reciting that Miss *Atkyns* had assured or agreed to assure, with the Hope Assurance Company, the life of the Countess of *Barrymore*, for the sum of 2275*l.* I am not certain whether it would be considered as an agreement to continue to insure ; I rather think it is merely a statement that an insurance had been effected. And then reciting that the annual premium amounted to 64*l.* 19*s.*,—which still would leave a very large per centage for the money advanced,—(for though

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in law the transaction is a purchase with a power to repurchase, in substance and effect it is a loan), *John Matthew Williams* covenants that if the redemption shall happen to take place at any time after the premium shall have been paid by Miss *Atkins* to the Assurance Company for the then current year, he will repay to her, at the time of the redemption, such proportion of the annual premium paid by her for the current year, as should belong to the part of the current year then unexpired.

If the deed had stopped there, I should have thought it afforded an inference in favour of an implied contract that Mr. *Williams* was to have the benefit of the policy: for the reasoning of the parties, in substance, was this; if Miss *Atkins* obtains the whole benefit of the year's premium she has paid, by receiving the whole of that year's annuity, she has nothing to complain of; but if Mr. *Williams* should redeem the annuity in the midst of a current year of the policy, then, as she was not to keep the policy for herself, she would have paid money as a premium for a period of time during which she did not incur any risk, and for which she had not received value; and therefore Mr. *Williams* was to repay her that money. If, therefore, the deed had stopped there, I should be of opinion, upon the intention of the parties, that the policy enured to the benefit of the grantor. But having regard to the words which follow,—"whether *John M. Williams* shall require the policy of assurance to be assigned to him, or whether he shall not require the same",—I do not see where the difficulty is. It is in effect saying;—whether Mr. *Williams* desires to have the policy or not, he must pay for the insurance against the risk for that portion of time during which Miss *Atkins* has not had the benefit of the policy.

The question is, I think, entirely free from doubt: I all therefore declare that the plaintiffs are entitled to a re-ignment of the policy, paying the proportion of the premium for the unexpired portion of the current year.

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Judgment.

LORD LANGFORD v. LITTLE.

TERCULES LORD LANGFORD, the father of the plaintiff, was, in and previous to the year 1829, seised in fee of several manors, lands, and hereditaments, in the county of Meath, subject to certain mortgages created by himself, and to certain charges and annuities created by family settlements and secured by long terms for years; and, amongst others, to two annuities of 800*l.* and 1500*l.* charged thereon by two several deeds bearing date respectively the 17th of February, 1821, and the 24th of May, 1821, and secured by terms for years created by said deeds, as a provision for *Louisa Lady Langford*, his wife;

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A. and *B.*, having a joint power of revocation and new appointment, by deed and fine reciting an agreement that *A.* should in manner therein-after mentioned secure to *B.* payment within twelve months of the principal sum of 12,000*l.* and the interest of a sum of 8000*l.*, irrevocably revoked the uses of the former settlement, and

pointed the lands to trustees for a term of 550 years, upon trust, as soon as conveniently might be (but with the consent in writing of *A.*, if during or within twelve months from the date of the deed, and afterwards of their own authority), to raise 20,000*l.* by sale of mortgage: provided that if the 20,000*l.* thereinbefore directed to be raised within twelve months should not within or at the expiration of that time be raised, or if *A.* should die before 20,000*l.* should be actually raised, then the deed, and every clause and thing therein, should be void; and the fine should enure to confirm the several estates and interests in the lands, subsisting immediately before the execution of the deed of revocation.

Held,—Upon the whole deed, that the money was to be raised within twelve months; and that if it were not raised within that time, or *A.* should die before it was raised, and within twelve months, the deed should be void.

The money not having been raised within the time:—*Held*, that the old uses, including the power of revocation, revived.

The ultimate limitation of the use in the former settlement was to *A.* in fee. After the expiration of the twelve months, *A.* made his will, devising all his estates; and after the execution of the will, *A.* and *B.* revoked the uses of the settlement, and limited the use to *A.* in fee. The deed revoking the uses of the settlement operates as a revocation of the will.

The will was made before, and the deed of revocation after the 1 Vic. c. 26:—*Held*, that the reversion in fee of which the devisor was seised at the time of his decease, did not pass by his will.

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and being so seized, by indentures of lease and release, bearing date the 8th of May, 1829, and made between *Hercules Lord Langford* and *Louisa* his wife of the first part, and the Marquis of *Sligo* and Viscount *Frankfort de Montmorency* of the second part, *Hercules Lord Langford*, in consideration of ten shillings, and for diverse good considerations, released and confirmed the said estates unto the Marquis of *Sligo* and Lord *Frankfort de Montmorency* and their heirs, to the use of himself for life; remainder to the trustees, during his life, to preserve contingent remainders; remainder, after his decease, to the plaintiff, his eldest son, for his life; remainder to trustees during his life, to preserve, &c.; remainder to the first and other sons of the plaintiff in tail male; and for default of such issue male, to the use of the Hon. *Hercules L. B. Rowley*, the second son of *Hercules Lord Langford*, and *Louisa* his wife, for his life; remainder to trustees during his life, to preserve, &c.; remainder to his first and other sons in tail male; and for default of such issue, to the use of the third and other unborn sons of *Hercules Lord Langford* in tail male; remainder to the use of the first and other daughters of *Hercules Lord Langford* in tail male; remainder to the first and other daughters of the plaintiff in tail male; remainder to the first and other daughters of *Hercules L. B. Rowley* in tail male; remainder to the use of *Louisa Lady Langford* for her life; remainder to the use of *Hercules Lord Langford* and his heirs for ever. This indenture contained powers of sale and exchange, and to lease the premises; and also a proviso, that it should be lawful for *Hercules Lord Langford* and *Louisa Lady Langford*, at any time or times thereafter during their joint lives, by any deed or writing duly executed by them in the presence of two or more credible wit-

ses, or in case *Hercules* Lord *Langford* should survive
Louisa Lady *Langford*, and that she should die without
 issue her surviving, or, in case of her leaving issue,
 on failure of such issue in the lifetime of *Hercules*
 Lord *Langford*, it should be lawful for him, the said Lord
Langford, by any deed or instrument in writing, to be sealed
 and delivered by him in the presence of and attested by
 like number of witnesses, to revoke, determine and
 make void the uses, trusts, limitations, intents and pur-
 poses, powers, agreements and declarations, thereinbefore
 expressed or declared, or any of them, with respect to the
 messuages, lands and hereditaments by said indenture con-
 veyed and assured, or any of them, or any part thereof; and
 the same or any other deed or instrument, so executed
 and attested as aforesaid, to declare, limit and appoint such
 uses and other uses, trusts, intents and purposes, and under
 subject to such powers, provisoes and agreements of
 concerning the premises or any part thereof, as to *Her-*
cules Lord *Langford* and *Louisa* Lady *Langford*, during
 their joint lives, or as to *Hercules* Lord *Langford* alone,
 as he should become entitled to exercise such power,
 the events aforesaid, should seem proper. Provided,
 however, that no revocation or new limitation should frus-
 trate or make void any lease, estate, rent or charge made,
 granted or charged upon the said premises by Lord *Lang-*
ford for valuable consideration, or otherwise by virtue of
 his former power or authority.

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The plaintiff by his bill charged, that one of the princi-
 pal considerations (though not therein expressed), which
 induced Lord *Langford* to settle his estates in the manner in
 the settlement mentioned, was an agreement between him
 and Lady *Langford*, that a certain mortgage debt affect-

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ing said estates, created by him in favour of *Nathaniel Hone*, for the sum of 30,000*l.*, by deed bearing date the 1st of May, 1829, should have priority over the annuities of 800*l.* and 1500*l.* charged on the estates by the deeds of 1821, for the benefit of Lady *Langford*.

Pursuant to a covenant contained in *Mr. Hone's* deed of mortgage of the 1st of May, 1829, for the purpose of giving priority to the mortgage debt over the annuities, a fine was levied by Lord and Lady *Langford* in Easter Term, 1829.

An indenture of release of eight parts, bearing date the 13th of August, 1833, was made and executed between *Hercules Lord Langford* of the first part, *Louisa Lady Langford* of the second part, *John M. B. Durant* and *George W. Rowley* of the third part, and trustees of the other parts. It recited that, by indenture of the 17th of February, 1821, certain parts of the aforesaid estates were limited (subject, amongst other incumbrances, to an annuity of 1200*l.* per annum, belonging to General *Robert Taylor*, for his life) to the use that Lady *Langford*, in case she should survive *Hercules Lord Langford*, should, from his decease, receive thereout a yearly rent-charge of 800*l.* during her life, by way of jointure: and that by the same indenture the lands therein mentioned were limited to trustees for a term of ninety-nine years, to secure the jointure; and to other trustees for a further term of 1600 years, to secure portions for the younger children of the marriage. The indenture of 1833 further recited, that by an indenture of the 24th of May, 1821, and another indenture of the 2nd of May, 1829, the estates comprised in the indenture of the 17th of February, 1821, were vested in *Thomas Crosthwaite*

the term of 200 years, in trust for *Nathaniel Hone* as mortgagee in fee of the said estates, for the sum of 30,000*l.*), for the purpose of further securing to him said mortgage money; and, subject thereto, the same estates were limited in trust during the joint lives of Lord and Lady *Langford*, to raise and pay unto Lady *Langford* an annual sum of 1500*l.* for her separate use, by way of mortgage money; and that, by the indenture of the 2nd of May, 1829, all the said estates were vested in trustees for the term of 500 years, from the decease of *Hercules Lord Langford* (subject, nevertheless, to the indenture of the 17th of February, 1821, and to the several incumbrances therein mentioned, and to the mortgage debt of 30,000*l.*), upon trust that Lady *Langford*, in case she should survive Lord *Langford*, should from his decease receive and take a yearly sum, or rent-charge, of 1200*l.*, for her life, in addition to the jointure of 800*l.* per annum, provided for her by the indenture of the 17th of February, 1821. The indenture of the 13th further recited the settlement of the 8th of May, 1829, and the power of revocation therein contained; and that certain unhappy differences had arisen, and still subsisted, between Lord and Lady *Langford*, and that they had mutually agreed to live separate and apart, upon the terms that Lord *Langford* should, in manner thereafter mentioned, secure unto Lady *Langford* payment within twelve calendar months from the date of said indenture, of the principal sum of 12,000*l.*; and should also secure unto her, during her life, the interest and annual proceeds of the several sums of 8000*l.* and 4000*l.*, to be respectively raised and invested, in manner and at the times also thereafter expressed; and that, in consideration thereof, Lady *Langford* should join with Lord *Langford* in revoking the uses of the said messuages, towns, lands and hereditaments, li-

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mitted and contained by and in the indenture of the 8th of May, 1829, and in appointing and settling the same hereditaments to the uses and in manner thereafter expressed; and should also concur with him in levying a fine of the same messuages, &c., for the purpose of releasing and extinguishing the rent-charge of 800*l.*, and the two several annual sums of 1500*l.* and 1200*l.*, secured to Lady *Langford* as aforesaid. And by said deed of the 13th of August, 1833, Lord and Lady *Langford*, in pursuance and execution of the power reserved to them for that purpose, absolutely and irrevocably revoked and made void the uses, trusts, limitations, intents and purposes, powers, agreements and declarations, by the settlement of the 8th of May, 1829, limited, expressed, declared and contained, concerning the messuages, &c., therein mentioned, save only and except the power to limit and appoint the same premises in the manner thereafter expressed: and, pursuant to that power, Lord and Lady *Langford* irrevocably appointed, that the estates mentioned in the indentures of the 17th of February, 1821, and the 2nd of May, 1829 (subject to the incumbrances then affecting same, except as before mentioned), should remain and be to the use of *John M. B. Durant* and *Georg W. Rowley*, their executors, &c., for the term of 550 years, upon the trusts after mentioned; and in the mean time, subject thereto, to the use of such persons, for such estates, and subject to such powers, provisoes, conditions and declarations, and in such manner in all respects, as *Hercules Lord Langford* by any deed or writing, with or without power of revocation and new appointment, or by his last will and testament in writing, or any codicil thereto, should from time to time direct, limit or appoint; and in default of appointment, to the use of *Hercules Lord Langford* during his life; and after the determination of that estate

his lifetime, to the use of a trustee during the life of Lord *Langford*, in trust for Lord *Langford*; and after the termination of that estate, to the use of Lord *Langford* and his heirs: and Lord and Lady *Langford* covenanted to pay a fine of the estates, for the purpose of releasing and extinguishing the rent-charge of 800*l.*, and the annual sums of 500*l.* and 1200*l.* The trusts of the term of 550 years were declared to be, that the trustees should, as soon as conveniently might be (but with the consent in writing of Lord *Langford*, if during or within the space of twelve calendar months from the day of the date of said indenture, afterwards of their own authority), by sale or mortgage of the term, or by and out of the rents and profits of the lands, raise and levy the sum of 20,000*l.*; and in case *Louisa Langford* should survive General *Robert Taylor*, or not otherwise, should levy and raise, by the ways or means aforesaid, within twelve calendar months after General *Taylor's* decease, the further sum of 4000*l.*, with interest at the rate of 5*l.* per cent. from the death of General *Taylor*; and should stand possessed of the said principal monies and interest, upon trust that they should pay and dispose of 1000*l.* (part of said principal sum of 20,000*l.*), and the residue thereof, unto such persons, and for such intents and purposes, as Lady *Langford*, notwithstanding her coverture, by writing under her hand, should direct; and in default of such direction, should pay the same into the proper hands of Lady *Langford*, for her sole and separate use, and not to be subject to the debts or control of Lord *Langford*; or in case of her death before receipt of said monies, then to the executors or next of kin of Lady *Langford*, as if she died sole and unmarried. And as to the sum of 8000*l.*, residue of the said sum of 20,000*l.*, and the interest thereof, and as to the further eventual sum of 4000*l.* and

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interest, in case the same should become payable, upon trust that the trustees should invest same upon Government or real security; and should, during the life of Lady *Langford*, pay the interest thereof to such person as Lady *Langford*, by writing under her hand, should from time to time, but not by way of anticipation, direct; and in default of such direction, pay the same into the proper hands of Lady *Langford* during her life, for her sole and separate use; and after her decease, if Lord *Langford* should be then living, should pay the interest thereof to Lord *Langford* during his life; and after the decease of the survivor of them should pay and apply the principal money towards payment and satisfaction of the portions provided for the younger children of Lord and Lady *Langford* by the aforesaid indenture of the 17th of February, 1821; and if there should not be any such younger child, should pay the same to the executors, &c., of Lord *Langford*. And Lord *Langford* covenanted with the trustees, that until they should levy and actually receive payment of the said sum of 20,000*l.*, by virtue of the trusts aforesaid, he would pay to Lady *Langford*, for her sole and separate use, on the eighth day of each successive calendar month, the sum of 60*l.* Provided always, and it was thereby agreed and declared between the parties, that if the said sum of 20,000*l.*, thereinbefore directed to be raised within the space of twelve calendar months from the day of the date of these presents, according to or under the trusts of the above-mentioned term of 550 years, should not within or at the expiration of that time be raised and paid to the trustees, upon the trusts and for the intents and purposes thereinbefore expressed, or if Lord *Langford* should happen to die before the said sum of 20,000*l.* should be actually raised and paid to them, then and in either of said cases, these presents, and every clause,

agreement, article and thing, therein contained, should cease, determine and be void, to all intents and purposes whatsoever; and the said fine so covenanted to be levied as thereinbefore mentioned, should thenceforth operate and ensure to corroborate and confirm the said several annuities or yearly rents or sums of 800*l.*, 1500*l.*, and 1200*l.*, respectively, provided for and secured to *Lady Langford* by the several indentures of the 17th of February, 1821, the 24th of May, 1821, and the 2nd of May, 1829; and also to corroborate and confirm the several other estates and interests of or in the said messuages, &c., subsisting or in force immediately before the sealing and delivery of these presents; anything thereinbefore contained to the contrary in anywise notwithstanding.

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In Michaelmas Term, 1833, Lord and Lady *Langford* levied a fine of all the lands, pursuant to the covenant for that purpose contained in the deed of the 13th of August, 1833.

By indenture of the 7th of August, 1834, made between Lord *Langford* of the first part, Lady *Langford* of the second part, and *John M. B. Durant* and *George W. Rowley* of the third part, after reciting that the sum of 20,000*l.* was under the trusts of the term of 550 years, directed to be raised within twelve calendar months from the date of the indenture of the 13th of August, 1833; which was, by a proviso therein contained, declared to be void if the same sum of 20,000*l.* should not be raised before the expiration of the same twelve calendar months; and that arrangements were making by Lord *Langford* for paying same, but that such arrangements could not, in all probability, be completed before Christmas next; it was agreed, and the trustees of the term of 550 years were thereby directed, authorized

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and empowered, to postpone and defer the raising of the sum of 20,000*l.*, under the trusts of the term, until the 25th of December, 1834.

No part of the 20,000*l.* was at any time, either during the lifetime of *Hercules Lord Langford* or since his decease, raised or paid pursuant to the deed of the 13th of August, 1833.

On the 19th of September, 1836, *Hercules Lord Langford* made his will, and thereby devised to trustees and their heirs all his freehold, copyhold, and leasehold messuages, lands, tenements and hereditaments, in England, Ireland or elsewhere, upon trust to sell; and to apply and dispose of the monies to arise from such sale, and the rents of the lands in the mean time, as Mrs. *Anna Maria Bennett Little* should, notwithstanding her coverture, direct and appoint; and in default of such direction, to pay the same into the proper hands of Mrs. *Little*, for her separate use, exclusive of her then or any future husband: and he directed that no sale should take place without the consent in writing of Mrs. *Little*: and that, until such sale should take place, the trustees should stand seised of the lands in trust to convey same to such persons and for such estates as Mrs. *Little* should appoint: and, in default of any such appointment, he directed his trustees to pay the rents and profits to his eldest son, *Clotworthy*, and his first and other sons in tail male; with several limitations over; and appointed Mrs. *Little* his executrix.

By deed poll bearing date the 25th of April, 1839, endorsed upon the settlement of the 8th of May, 1829, after reciting the indenture of the 24th of May, 1821, whereby a term of 200 years was limited to trustees, upon trust, dur-

the joint lives of Lord and Lady *Langford*, to raise the annual sum of 1500*l.* for Lady *Langford*; and after further reciting that Lord and Lady *Langford* were desirous to revoke the uses limited by the within-written indenture concerning the estates therein comprised, and to limit the same to the uses thereafter expressed, subject to the term for 200 years and the trusts thereof; Lord and Lady *Langford* revoked all the uses limited by the within-written indenture, save the power to appoint the same; and directed that said lands should go and be (subject to the said term of 200 years and the trusts thereof) to the use of such persons, for such estates, and subject to such powers, provisions, conditions and declarations, and in such manner in all respects, as *Hercules Lord Langford*, by any deed or writing, or by his last will and testament, or any codicil thereto, should from time to time direct or appoint; and in default of, and until such direction or appointment, to the use of Lord *Langford* for his life; and after the determination of that estate in his lifetime, to the use of a trustee during his life, in trust for Lord *Langford*; and after the determination of that estate, to the use of Lord *Langford* and his heirs for ever.

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Hercules Lord Langford died on the 3rd of June, 1839, having made any other will or disposition of the estates as before mentioned; and left the plaintiff, *Clotworthy Lord Langford*, his eldest son and heir at law, and two other sons, him surviving. Mrs. *Little* and the trustees of the will of Lord *Langford* possessed themselves of the title to the estates, and did several acts of ownership in relation to the estates, by renewing leases and receiving fines.

The bill (which alleged the existence of outstanding

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terms) was filed by *Clotworthy Lord Langford*, a minor, against Mrs. *Little* and the other persons claiming under the will of *Hercules Lord Langford*; and it prayed that the rights of the plaintiff in the premises might be settled by the decree of the Court, and that he might be put into possession of the estates comprised in the indenture of the 8th of May, 1829, and that the defendants might be restrained from interfering with the plaintiff's rights in the premises, and from exercising acts of ownership over the estates; and for delivery of title deeds, and the removal of temporary bars. Mrs. *Little*, by her answer, claimed to be entitled to the estates under the will of Lord *Langford*.

Argument.

Mr. Serjeant *Warren*, Mr. *Brooke*, and Mr. *Hayes*, for the plaintiff.

The power of revocation and new appointment reserved by the deed of the 8th of May, 1829, was fully and irrevocably exercised by the deed of the 13th of August, 1833; and could not be a second time exercised: *Ward v. Lathall*(a). Upon the execution of the deed of 1833 the power was at an end. The deed of 1833 operated as a conditional appointment, viz., provided the 20,000*l.* was raised within the period limited; but if the condition were not performed, then the fine of 1833 was to enure to confirm the then existing estates and interests mentioned in the deed of 1829. The power of revocation is not either an estate or an interest. But, if this be not so, yet on the authority of *King v. Melling*(b), the effect of the fine of 1833 was to destroy the power of revocation reserved by the settlement of 1829. [THE LORD CHANCELLOR.—It was only a mode of

(a) 2 Kel. 260.

(b) 1 Vent. 214, 225.

exercising the power, and did not work it any injury.] If a deed of 1833 became wholly inoperative because the 20,000*l.* was not raised within the period limited, and the estate to the estate was governed by the deed of the 8th May, 1829, still the will of Lord *Langford* was not an execution of the power reserved by that deed; which only authorized a joint appointment by Lord and Lady *Langford*, or a sole appointment by Lord *Langford* in certain events which have not happened. The will, therefore, can only operate on the reversion in fee, reserved to Lord *Langford* by the deed of 1829; but even as to that interest it was subject to be defeated by the exercise of the power of revocation and appointment contained in that deed; which power was exercised by the deed poll of the 25th of April, 1839; and thereby the will was revoked: *Burgoigne v. Burgoigne* (a). Even supposing that the deed of 1833 was operative notwithstanding the 20,000*l.* was not raised, yet the power of revocation reserved by that deed to Lord *Langford* alone was well executed by the deed poll of 1839 (the formalities having been observed), though that instrument was also executed by Lady *Langford*.

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Mr. Monahan, Mr. Darley, and Mr. Keown, for Mrs. Little.

It is not the true construction of the deed of 1833, that it became absolutely void upon the 20,000*l.* not being raised within the twelve months; for if it were, then, as the money could not be raised within that period without the consent of Lord *Langford*, it would be in his power to nullify the arrangement, or not, as he pleased. The con-

(a) 1 Atk. 575.

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struction of that clause is difficult ; but whatever may be the operation of it,—whether, in the events which have happened, the deed of 1833 is binding or not,—the will of Lord *Langford* operated to pass the reversion in fee, which, according to both the deeds, was vested in him. The argument, that the exercise of the power by the deed of 1833, though void, operated to prevent the future exercise of the same power, cannot be sustained ; for, in the event provided for, the deed of 1833 itself, and everything therein contained, was to be void. It is admitted that the will operated on the reversion in fee, reserved by the deed of 1829. Now, it is true that if a man seised in fee makes his will, devising his estate, and afterwards conveys the estate to the use of himself in fee, that is a revocation of his will ; not by reason of a change of intention on the part of the deviser, but because of the change of the seizin, though there has been no change of the use : *Cave v. Holford*(a). But no case has decided that if the conveyance is not a deed altering the seizin, but merely operating upon the use, it is a revocation. The principle upon which *Vawser v. Jeffery*(b) was decided is applicable to this case ; it was there held that the will was not revoked by the subsequent covenant to surrender the copyholds, for the seizin was not changed. So here, the use which Lord *Langford* had upon the execution of the deed of revocation and new appointment of the 25th of April, 1839, was the same use which he had when he made his will.

Again, it is provided by the 1 Vic. c 26, s. 23, that no conveyance made subsequently to the execution of a will shall prevent the operation of the will with respect to such

(a) 2 Ves. Jr. 604 ; 3 Ves. 650. (b) 3 Russ. 479.

state as the testator shall have power to dispose of by will at his decease. It is true that here the will was made before that Act; but the deed of 1839, which is relied on as a revocation of the will, is subsequent to the Statute. The will is, therefore, within the Act; it falls within the principle of *Hobbs v. Knight*(a), in which it was held that where a will was executed before the Statute, a revocatory act done after the Statute was to be considered with reference to the provisions of the Statute.

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Mr. *Brooke* in reply.

In the *Earl of Lincoln's* case(b) there was no alteration of the seizin: when the will, in that case, was made the legal estate was outstanding in a mortgagee; and yet it was held that the will was revoked by a subsequent conveyance of the lands in contemplation of a marriage which did not take effect. The 1 Vic. c. 26, s. 23, does not apply; it merely provides that a conveyance shall not *prevent* the will having an operation, which, but for such conveyance, it would have had; that is, passing estates of which the testator had power to dispose at the time of his decease; but wills executed before the 1 Vic. c. 26, had not that operation.

THE LORD CHANCELLOR :—

This case depends upon the operation of the late Lord Langford's will; and that depends for its operation upon the true construction and effect of the several settlements

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(a) 1 Curteis, 768.

(b) Show. Par. Ca. 154; 1 Eq. Ca. Abr. 411, Pl. 11.

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and deeds executed by Lord *Langford* and Lady *Langford* of the estates which are claimed by the defendant under the will.

By the post-nuptial settlement of the 8th of May, 1829, the estates (which had been previously charged with large annuities for Lady *Langford*, for her separate use and by way of jointure, and with large portions for younger children) were conveyed and settled to the use of Lord *Langford* for life, with remainder to his issue in strict settlement; with remainder to Lady *Langford* for life; remainder to Lord *Langford* in fee. The settlement contains the usual provisoes, and also a power of revocation and new appointment, by Lord and Lady *Langford*, during their joint lives, or by him alone in events which have not happened. Under this settlement, therefore, Lord *Langford's* only devisable interest was the remainder in fee.

By a settlement of the 13th of August, 1833, made upon the separation of Lord and Lady *Langford*, it was recited that the agreement was, that Lord *Langford* should, in manner after-mentioned, secure to her payment within twelve months of 12,000*l.*, and should also secure to her during her life the interests of 8000*l.* and 4000*l.*, to be raised in manner and at the times after expressed; and she was, in consideration thereof, to join in revoking the uses of the settlement of 1829, and in appointing the estates to new uses, and also to concur in levying a fine (which was afterwards duly levied), in order to extinguish her rent-charges. The power of revocation is in terms regularly exercised; and the estates are appointed to a trustee for a term of years, and, subject to that term, to the common uses in

in favour of Lord *Langford*, his heirs, appointees, and assigns, to bar dower.

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The trusts of the term were, that the trustees should, as soon as conveniently might be, but not without the consent of Lord *Langford*, if during or within twelve calendar months from the date of the deed, and afterwards of their own authority, by sale or other usual means, raise 20,000*l.* being the aggregate amount of the 12,000*l.* and 8000*l.*); and also should, if Lady *Langford* should survive a person who had a charge on the estate for his life, raise within twelve months from his death, 4000*l.* The 12000*l.* was to be held for the separate use of Lady *Langford*, and the 8000*l.* and 4000*l.* were settled on Lady *Langford* for life, then on Lord *Langford* for life, and were then to be applied towards satisfaction of the portions already provided for the younger children. Lord *Langford* covenanted to pay Lady *Langford* 60*l.* a month until the trustees should raise the 20,000*l.* It was then provided that if the 20,000*l.*, "before directed to be raised within the twelve calendar months from the date of the deed," according to or under the trusts, should not, "within or at the expiration of that time," be raised and paid to the trustees, or if Lord *Langford* should die before the 20,000*l.* should be actually raised and paid, in either case the deed and every clause therein should cease to be void to all purposes, and the fine should enure to confirm the several rent-charges secured to Lady *Langford* by the previous deeds; and also to corroborate and confirm the several other estates and interests" in the lands subjecting, or in force immediately before the execution of that deed.

Immediately after the execution of this deed, Lord *Lang-*

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ford had a devisable interest in the whole fee-simple, subject to the charges; but his estate and power under the deed were subject to be defeated. The trusts of the term upon which the operation of the clause defeating the deed depends, were much discussed at the Bar. They are inaccurately framed; but they admit, I think, of a construction which gives effect to all the words, and yet would carry the intention of the parties into operation. The recital shows that Lady *Langford*, who was relinquishing extensive rights, was to have 12,000*l.* within twelve months; and the trusts of the term, which had for their object to control the raising of the money till the last moment, without Lord *Langford's* consent, admit of this construction,—that the money is to be raised within the term of twelve months with his consent; but, if that is withheld, immediately after the twelve months of the proper authority of the trustees. The 4000*l.* is in like manner to be raised within twelve months after the death of the third party. The clause to avoid the deed makes that clear which is ambiguous in the prior direction of trust; and, coupled with the recital, leaves no doubt in my mind. It provides that if the 12,000*l.* *before directed to be raised within twelve months*, shall not *within or at the expiration of that time* be raised and paid to the trustees, the deed shall be void. This, therefore, is an explanation on the face of the deed of the meaning of the expressions found in the declaration of the trust. And, even if this be not the true view of the case, yet the proviso must be held to operate by its own force to avoid the deed in the event for which it provides. But then it was argued that the provision itself is unintelligible; for the deed is to be void if the 20,000*l.* is not raised and paid as before mentioned, or if Lord *Langford* should die before it was actually raised and paid. This objection cannot be maintained. The meaning of the

proviso is, that if Lord *Langford* should die before the money is raised, and therefore within the period limited for raising it, or if he live, but that the money is not raised within the allotted period, the deed is to be void. Both events,—if I may so express myself,—happened: the money was not raised within the period, and Lord *Langford* died before it was raised; in short, it has never been raised.

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In my opinion, on the happening of the first event the deed became void, and the old uses revived. Lord *Langford* after that period had a devisable interest in the remainder in fee only, expectant upon the determination of the prior estates to his issue and to Lady *Langford*. An argument was addressed to me, in order to show that in that event, the joint power of revocation in the settlement of 1829 was not restored; because the expression is, that the fine should confirm *the estates and interests* in the lands, and a power of revocation is neither an estate nor an interest. But upon the true construction of the clause, I think that all the uses were restored. The deed of 1833 was to become void; and it cannot be doubted that the powers of leasing and the like in the settlement of 1829 were intended to be, and actually were restored; and I cannot collect any intention to exclude his power in particular.

This was the state of circumstances in November, 1836, when Lord *Langford* made his will, under which the defendant, Mrs. *Little*, claims all his freehold estates against his son and heir at law, the present Lord *Langford*, the plaintiff. Now this will operated on the remainder or reversion in fee of which the late Lord was seised; but not rather, as the conveyance of the fee to him has ceased to operate in his favour by force of the proviso to which I have

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referred : for the deed of August, 1834, only enlarged the time till the 25th of December in that year :—and that deed, I may observe, states expressly that the 20,000*l.* was to be raised within twelve months from the date of the deed of 1833, which, it is recited, was, by a provision therein contained, declared to be void if the said sum of 20,000*l.* should not be raised before the expiration of the same twelve calendar months ;—a clear admission by the parties of the intention of the deed of 1833.

By a deed of April, 1839, Lord and Lady *Langford*, under the power in the deed of the 8th of May, 1829, considering that to have been restored, revoked the uses of that deed and appointed the estate once more to the common uses in favour of Lord *Langford*, his heirs, appointees and assigns, to bar dower. Now, of course under the old law, neither the power nor the fee given and limited to Lord *Langford* by this deed was executed or could pass by his will of 1836. But it was argued, first, that there was no revocation of the will, as these instruments operated under the power, and the seisin was not changed or affected; and secondly, that the case fell within the new Statute of Wills.

I am not aware how the doctrine of revocation bears upon this case; for to the plaintiff it would be indifferent whether the remainder in fee vested in Lord *Langford* in 1833, if it existed after the revocation in 1839, passed by the will of 1834 or not; but I must observe that, to the revocation of a will under the old law, a change of estate is sufficient to operate a revocation, and it is not necessary that the seisin should be changed. The doctrine referred to rather is, that although nothing but the seisin is changed

transferred, and there is no disposition of the ownership but a partial one, yet the will is revoked; and the use, although the old one, cannot pass by the prior will. The case of *Vawser v. Jeffery*, which was much relied upon, was, I think, properly decided upon the appeal, and rested upon the distinction between freehold and copyhold tenure; but it does not touch the merits or law of this case. There, the remainder or reversion in fee, which would have passed by the will but for the subsequent revocation, ceased to exist after the revocation; and Lord *Langford* obtained the whole fee simple or a power of disposition over it. No such estate as the reversion devised could be executed, after the revocation in 1839, without also creating the previous estates which the revocation equally destroyed. Such an independent estate, to spring or rise upon the events upon which the reversion in fee, under the settlement of 1839, would have fallen into possession, would be void at law.

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The second point depends upon the Statute of 1 Vic. c. 26, which, in nearly its last clause, enacts that the Act shall not extend to any will made before the first of January, 1838; and this will was made before that period. The case of *Hobbs v. Knight*(a) was relied upon, where it was held that the ceremonies required to a revocation of a will, applied even to a will executed previously to the 1st of January, 1838; and, therefore, it was urged that the twenty-third section of the Statute equally applied to Lord *Langford's* will. Now it is clear that the provisions of the Statute, as to the operation of a will and of the gifts in it, do not apply to wills simply resting upon an execution prior to the 1st of January, 1838. It is altogether a different question

(a) 1 Curtis, 768.

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whether the ceremonies required to a revocation of a will, for example, should not apply to every existing will, without regard to the time of its execution. The twenty-third section relied upon enacts, that no conveyance or other act made or done subsequently to the execution of a will (except a due revocation under the Act), shall prevent the operation of the will with respect to such estate or interest as the testator shall have power to dispose of at the time of his decease. This was a provision properly applicable to wills executed on or after the first of January, 1838, because the Act enables testators to dispose of such interests as they may have in lands at their deaths; but a will executed in or before 1837 had no such operation, and it would, therefore, be difficult to apply the twenty-third section to such a case. The next section, the twenty-fourth, in like manner enacts, that every will, as to real estate, shall speak and take effect as if it had been executed immediately before the death of the testator; but this does not apply to a will executed before the 1st of January, 1838. Now the twenty-third section assumes that the will would by its own operation, but for the act of revocation, pass the estate which the testator had power to dispose of at his death; and this is so as to wills within its general provisions, because the Statute gives to such wills that operation; but wills like that before me are expressly excluded from the general effect of the Statute. They, therefore, cannot be held to pass any estate over which the testator had not a disposing power at the date of the will; and if the interest which was devised is, as in this case, lost, or ceases to exist by subsequent conveyances, a new and altogether different estate, although in the same lands, cannot pass by the will. As the Statute for the first time gave a power to dispose of all estates which a man might have at his death, and made the

will as to the disposition of real estate, with which alone I am now dealing, speak as at the testator's death, it followed that no alienation or alteration of estate ought to affect the devise of an estate, so far as the testator at his death had any interest in the estate to answer it. This was consistent with the other provisions. But as to wills executed before the 1st of January, 1838, which had no such operation and were excluded from the Act, it would have been inconsistent to give to a revoked will an operation over a new interest acquired subsequently to the will, which it would not have had over the same interest, if the will had remained unrevoked. Upon these grounds I am of opinion that the plaintiff is entitled to a declaration that the estate did not pass by the will; and that he is entitled, as heir at law, to the possession of the estate, and to the delivery of the title deeds to him. Regularly, some of the questions in this case should have gone to law; but I undertook the duty of deciding them at the request of both parties. I cannot give the party who fails in her defence, costs; but as the late Lord *Langford* raised the question by his will and subsequent acts, I shall not give any costs against her.

I may observe that, according to the copy of the deed of revocation of 1839, with which I have been furnished, the attestation is confined to the execution of that deed by Lord *Langford*; and if that be correct, a serious question might arise whether, notwithstanding the terms of the power, the revocation was valid(a). But the view which I have taken of the case renders it unnecessary to pursue this inquiry.

(a) The execution of the deed of 1839 by Lady *Langford*, was properly attested.

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April 17.

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June 18, 19, 25.

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his real estate

for the use of

his younger

children with

the payment of

such sums of

money and other

interest which

he might have

in the joint

stock of the

Company, as

he should assign

or bequeath to

his heir, any

settlement

to the contrary

notwithstanding.

Under a settle-

ment of 1761,

A. was tenant

for life of lands

through which

the navigation

passed, with

powers of joint-

turing and leasing;

with remainder

to B., his eldest

son, in tail. A.

was a subscriber

to the undertaking,

by reason of

advances made

by him before

and after May,

1792. In 1791

A. and B. suffered

recoveries, and

declared the

BY indenture of settlement dated the 12th of November, 1761, executed upon the marriage of *Arthur*, then Earl, and afterwards Marquis of *Donegal*, with Lady *Anne Hamilton*, certain estates belonging to the *Donegal* family, situate in the

and through whose lands it should pass, to charge his real estate for the use of his younger children with the payment of such sums of money and other interest which he might have in the joint stock of the Company, as he should assign or bequeath to his heir, any settlement to the contrary notwithstanding.

Under a settlement of 1761, A. was tenant for life of lands through which the navigation passed, with powers of jointturing and leasing; with remainder to B., his eldest son, in tail. A. was a subscriber to the undertaking, by reason of advances made by him before and after May, 1792. In 1791 A. and B. suffered recoveries, and declared the uses to be to A. for life; and after his decease, as A. and B. should jointly appoint: and until such joint appointment, A. was to be at liberty to exercise all powers given to him by the settlement of 1761. In 1792, A. and B. agreed to resettle the estates, for valuable considerations moving from each of them: and by deed of the 17th of May, 1792, A. and B. appointed the lands, after the decease of A., and subject and without prejudice to his life estate, and to all powers and authorities then vested in or belonging to him, whether appendant or in gross or otherwise, to Z., in fee, in order that he might join in the intended resettlement of the estates: and by another deed of the 19th of May, 1792, A., B., and Z., reciting A.'s powers under the settlement of 1761, and the intention of the parties to resettle the estates, subject to the powers thereafter mentioned, conveyed the estates to A. for life; remainder to B. for life; remainder to his first and other sons in tail: and new powers of leasing and jointturing were given to A. This deed did not contain any saving of the former powers of A. under the settlement of 1761 or otherwise; and no allusion was made in it to the power of charging under the 19 & 20 Geo. III. c. 32.

A., by his will, reciting the Act, devised all his shares in the Company to B., his heir, executors, &c. and charged the settled lands with 30,000*l.* for his only younger child.

Held,—1. That the power to charge given by the Act was not destroyed by the recovery of 1791; it not being the intention of the parties to the recovery, that the power should be destroyed thereby.

2. That it was destroyed, *quoad* advances made before the 19th of May, 1792, by the settlement of that date, which amounted to a contract by A. not to exercise the power as to advances then made; but that it existed as to subsequent advances.

3. That "heir" in the Act meant heir to the settled estate, and included, as far as the law would permit, all persons claiming in succession under the settlement: and that the power given by the Act was well executed by the will of A.; for that the bequest of the shares to B., his heirs, executors, &c., thereby made, enured, according to the title, for the benefit of the remainder-men under the settlement.

4. The younger child of A., who was also his executor, having without fraud consented, and executor, that the Company should issue new debentures to B. in lieu of some which had been granted to A. and were lost by the executor:—*Held*, that the charge on the estate was not affected thereby.

5. Trustees to preserve contingent remainders are not necessary parties to a suit to raise a charge affecting the inheritance.

6. The costs of raising a family charge should be borne by the estate; but the costs occasioned by dealings with the charge should be borne by the charge, and not by the estate.

Counties of Antrim, Down and the town of Carrickfergus, including amongst them the town of Belfast, the lake of water called Lough Neagh, the river called the Lagan and the ground and soil thereof, and Island Magee, were, together with other estates situate in the counties of Donegal and Londonderry, conveyed to the use of *Arthur Earl of Donegal*, for his life; remainder to trustees and their heirs during his life, upon trust to preserve contingent remainders; then to the use that *Lady Anne Hamilton*, if she should survive her intended husband, should receive thereout a rent-charge by way of jointure; and, subject thereto and to a term for securing the same, to the use of trustees for a term of 400 years, upon trust, in the event (which happened) of there being only one younger child of the marriage, to raise the sum of 15,000*l.* as a portion for him or her; and, subject thereto, to the use of the first and other sons of *Arthur Earl of Donegal* in tail male: with several limitations over in the usual course of family settlements. This settlement contained powers authorizing *Arthur Earl of Donegal* to limit a jointure for an after-taken wife, and to charge the lands with portions for younger children; and also to demise the houses and lands in the town of Belfast in fee-farm, for lives, years determinable upon lives, or ninety-nine years absolutely, at the most improved rents and without taking any fine in respect thereof; and also to demise and lease all the residue of the settled lands, for any term not exceeding three lives or forty-one years, or sixty-one years, at any rent not less than the rent then payable for the same respectively: and to demise Island Magee for the term of ninety-nine years at the then rent thereof. *Arthur Earl of Donegal* was also by this settlement empowered to charge the part of the settled estates situate in Donegal and Londonderry with the sum of 30,000*l.* for his own benefit.

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There was issue of this marriage two sons only ; namely, *George Augustus*, Viscount *Chichester*, who, upon his father being created Marquis of *Donegal*, was known by the title of Earl of *Belfast* ; and Lord *Spencer Chichester*. *Anne*, Countess of *Donegal*, died before 1795.

Upon the marriage of Lord *Spencer Chichester* in 1795, the charge of 15,000*l.* was settled in trust to pay the interest thereof to Lord *Spencer Chichester* for his life ; and after his decease, upon trust for the benefit of his intended wife and of the issue of the marriage.

The several Acts passed for carrying on the Lagan Navigation were consolidated and amended by the 19 & 20 Geo. III. c. 32. This Act, after reciting the former Acts on the same subject, and that thereby several duties had been granted to the Corporation for promoting and carrying on an Inland Navigation in the Kingdom, to be by them expended in making the River Lagan navigable between Lough Neagh and the town of Belfast ; and that the local Commissioners for carrying on the Inland Navigation were empowered by an Act of the 13 & 14 Geo. III. c. 12, to borrow the sum of 10,000*l.* for the purpose of carrying on the Lagan Navigation, to be secured as therein mentioned ; and that said sum of 10,000*l.* together with the produce of the duties, had been expended on the navigation, but that same were far from being sufficient to complete the undertaking : and further reciting, that several persons therein named (amongst whom was *Arthur* Earl of *Donegal*), and others, were willing to advance and pay considerable sums of money towards completing the work, and therefore it became proper and expedient that they should have some adequate compensation and security for the sums they

ould so advance and pay, and that they should have the
duce of certain duties therein mentioned, and also of the
ls and lockage payable and to be paid on the navigation,
til thereby, or by some other means, not only the sums
ich had already been borrowed, but also such further
ms of money as should by virtue of this Act be advanced
d applied for the purpose aforesaid, with interest at 5*l.* per
nt. per annum, should be fully paid off and satisfied: it
is enacted that the said several persons before named in the
ct, their executors, administrators and assigns, having a
operty in the stock of the Company and not otherwise, and
so such other persons as had theretofore become subscribers
pursuance of the former Acts, or should thereafter under
is Act advance and pay any sum of money for carrying on
e navigation, and the executors, administrators and assigns
such persons having a property in the stock of the Com-
ny and not otherwise, should be a body politic and cor-
rate, by the name of the Company of Undertakers of the
gan Navigation. And it was enacted, sect. 6: "That the
eral sums of money heretofore subscribed or paid, pur-
nt to the said recited Acts of Parliament or any of them,
ether with all such sums of money as shall, by virtue of
under this Act, be advanced and paid for the carrying on
said navigation, shall be deemed, taken and considered,
all intents and purposes, as the joint stock of the said
mpany." By the thirteenth section, all the lands, rights,
ers, towing-paths, powers, &c., then vested in the Corpo-
on for promoting and carrying on an Inland Navigation
his Kingdom, for the purpose of carrying on the navi-
on between Belfast and Lough Neagh, together with
luties, rates and impositions, payable for or on account of
rising from the said work, were vested in the Com-
y of Undertakers and their successors. The seventeenth

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section directed the tolls, &c., to be applied (after payment of expenses) first in payment of the interest due to the creditors under the former Acts, according to the priorities of their debentures; and then in payment of interest due to such persons as should advance and pay any sum or sums of money, in pursuance of this Act, for carrying on the navigation. And by the twentieth section it was enacted, that if the Company should think proper at any time to borrow money for carrying on the works, more than they should themselves choose to subscribe and advance for that purpose, it should be lawful for them to borrow, upon the credit of the works and their estates and interest therein, any sum not exceeding the amount of so much of the sums to be subscribed under the Act, as should be actually expended on the works; and to strike debentures for such sums so borrowed; which debentures should be an actual charge and lien upon such parts of the Company's estate as should be therein specified. By the twenty-first section, the debentures were made assignable by indorsement, or by will; and it was also provided that every proprietor of the joint stock of the Company might assign or bequeath his share therein; and that, upon notice given of any transfer of a debenture, or of any part of the stock, to the clerk of the Company, and entry thereof made by him in the books of the Company, the indorsee, assignee or legatee, should be entitled to the sole benefit of the sum transferred. The twenty-second section provided that the Company, their executors, administrators and assigns, should be entitled to the tolls and profits vested in them, in proportion to their respective interests in the joint stock of the Company, which was declared to be personal and not real estate. And by the twenty-third section it was enacted, "That it shall and may be lawful to and for every subscriber under the

said former Acts, or any of them, and every other person who shall advance or pay any sum of money under and by virtue of this Act towards completing the said work, and through whose lands or estate the said navigation or any part thereof now doth or hereafter may pass and be carried, to charge his real estate for the use of his younger child or children with the payment of such sum and sums of money and other interest which he may have in the said joint stock, as he shall assign or bequeath to *his heir*, any settlement or any law, usage or custom to the contrary notwithstanding ; it being judged most fit and proper that the proprietors of estates, through which the said navigation does or shall pass, should have a property and interest therein."

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Under this Act, *Arthur Earl of Donegal* became a subscriber for carrying on and completing the Lagan Navigation, and advanced large sums of money for that purpose ; and received from the Company of Undertakers debentures for the sum of 62,000*l.* ; and in consequence of the sums so subscribed and advanced by him, and by virtue of the debentures, became entitled to an interest in the Lagan Navigation and in the joint stock of the Company to that amount. Some of the advances were made by him before May, 1792, and others subsequently. It did not appear whether the Marquis had advanced money to the amount of the debentures given to him ; but it was proved that his actual advances exceeded 30,000*l.*

The River Lagan was the boundary of the settled estates in the county of Antrim ; the settled lands lay at the left hand side of the river, and extended but a short way along the left bank. The navigation there was carried on in the bed of the River Lagan, except in one place, where a cut was

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made for the river through the adjoining settled estates, whereby about twelve acres of land were separated by the cut from the rest of the settled estates.

George Augustus Viscount Chichester attained his full age of twenty-one years prior to the year 1791; and for the purpose of barring the entail in the settled lands, and limiting the same to new uses, *Arthur Earl of Donegal* and *George Augustus Viscount Chichester*, by indenture of bargain and sale, enrolled, bearing date the 5th of May, 1791, conveyed the settled lands (subject to a term of 500 years, created by the settlement of the 12th of November, 1761, and to such power of appointment, disposal and interest, as the Earl of *Donegal* had, or might have, of or in the sum of 30,000*l.*, provided to be raised under that term) to *David Gordon* and his heirs, to the intent that he might become tenant to the *præcipe* in recoveries to be suffered of said lands; which recoveries, when suffered, were to enure to the use of *Arthur Earl of Donegal* for his life; and after his decease, to the use of such persons, and for such estates, and with such remainders over, and subject to such powers, &c., as *Arthur Earl of Donegal* and *George Augustus Viscount Chichester*, from time to time, during their joint lives, should by deed appoint; and as well in default of such joint appointment, as also where any such joint appointment should be made, which should not amount to a complete disposition of all the lands, and of the whole estate and interest therein, then, subject to the prior estates and interests so limited and appointed, to the same uses, intents and purposes, and upon the same trusts, and subject to the same powers, provisoes, conditions, restrictions, charges, limitations, declarations and agreements, as by the indenture of the 12th of November, 1761, were

nited and declared, concerning the same, which should be
 en subsisting and capable of taking effect: provided always,
 d it was thereby agreed and declared, that in the mean
 ne, and until such complete joint limitation and appoint-
 ment of the whole of the said hereditaments and premises
 ould be made and take effect, *Arthur* Earl of *Donegal*
 ould have and be vested with, and accordingly it should
 : lawful for him, from time to time, or at any time, to
 :ercise and execute all and singular the powers and autho-
 :ies, of what nature or kind soever, given or reserved to
 m in and by the indenture of settlement of the 12th
 November, 1761, which he might have exercised and
 eated in case this indenture had not been made, and
 e recoveries thereby agreed to be suffered had not been
 offered.

Common recoveries were, in the same year, 1791, duly
 offered of all the settled estates, pursuant to the agreement
 contained in this deed.

In 1792, *Arthur*, who had previously been created
 Marquis of *Donegal*, and his eldest son, *George Augustus*,
 then Earl of *Belfast*, agreed to resettle that portion
 of the settled estates which was situate in the counties
 of Antrim, Down and Carrickfergus; and accordingly,
 by indenture of the 17th of May, 1792, made between
Arthur Marquis of *Donegal* and *George Augustus* Earl of
Belfast of the first part, Sir *Charles H. Talbot* of the
 second part, and Lord *Archibald Hamilton* of the third
 part; after reciting the deed of the 5th of May, 1791, and
 the recoveries suffered in pursuance thereof, *Arthur* Mar-
 quis of *Donegal* and *George Augustus* Earl of *Belfast*, in
 pursuance of the powers enabling them in that behalf, ap-

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pointed that the several lands and hereditaments situate in the counties of Antrim, Down, and Carrickfergus, and comprised in the indenture of the 5th of May, 1791, and the recoveries, should, from and immediately after the decease of *Arthur Marquis of Donegal*, go and remain, and that the recoveries should enure, and the recoverors and their heirs stand seised thereof, subject and without prejudice to the estate for life or life interest of *Arthur Marquis of Donegal* therein, and to the several powers of granting leases and making jointures, and all other powers and authorities then vested in or belonging to the said Marquis, whether appendant to his estate for life or life interest therein, or in gross, or otherwise howsoever, to the use of Lord *Archibald Hamilton*, his heirs and assigns, for ever; upon trust, and to the intent that he might become seised of the reversion and inheritance in fee-simple expectant on the decease of *Arthur Marquis of Donegal* in the said lands and premises, in order that he might join with the said Marquis of *Donegal* and the Earl of *Belfast* in conveying and settling the same to the several uses and trusts, and for the several intents and purposes, and with and under and subject to the several powers, provisoes, conditions, restrictions, limitations, declarations and agreements, as were intended to be declared or expressed concerning the same, in a deed then prepared, and intended to bear date the 19th of May, 1791, and to be made between, &c.

By indenture of seven parts, dated the 19th of May, 1791 (being the deed referred to by the indenture of the 17th of May, 1791), and made between *Arthur Marquis of Donegal* of the first part, Lord *Archibald Hamilton* of the second part, *George Augustus Earl of Belfast* of the third part, Lord *Spencer Chichester* of the fourth part, Lord *Elcho*

of the fifth part, Sir *Charles H. Talbot* and the Reverend *Jonathan Morgan* of the sixth part, and *Henry Skeffington* and *William J. Skeffington* of the seventh part; after reciting (*inter alia*) the indentures of the 12th of November, 1761, and of the 5th of May, 1791, and that the rents then payable for the lands and premises thereby granted (and which *Arthur Marquis of Donegal* had, by virtue of the settlement of 1761, power to demise at any rents not less than the rents payable in 1761, without any restriction from fining them down), exceeded the rents of the same lands in the year 1761 by an annual sum of about 6500*l.*; and that many of the lessees and tenants thereof were desirous of taking leases at the rents paid for them in 1761, and to fine down the increased annual rent thereof; and that the Marquis of *Donegal* had expended upwards of 30,000*l.* in permanently improving the settled estates: and further reciting that the Earl of *Belfast* had no certain income for his support and maintenance; and that he had, since he attained his age, without the privity of his father, contracted debts to a large amount by granting annuities and borrowing money on judgments and other securities, which he was unable to pay without the assistance of his father: and further reciting that the Marquis of *Donegal*, being desirous of preserving the estates in the counties of Antrim, Down and Carrickfergus in his family, so as to go along with the Marquisate of *Donegal*, for the support of that title and dignity, had some time before proposed to the Earl of *Belfast* to join with him in making a settlement of all the said lands in the counties of Antrim, Down and Carrickfergus, so that the same might be limited and assured to go, immediately after his decease, to the use of the Earl of *Belfast*, for his life only, with remainders to his first and other sons successively in tail male, and with such remainders over as thereafter mentioned, and

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subject to, and by, with and under such powers, provisions, conditions, restrictions, limitations, declarations and agreements, as were thereafter declared and expressed concerning the same; and to induce the Earl of *Belfast* to join in making such settlement of the estates, and as a consideration for the same, he, the Marquis of *Donegal*, had also proposed and agreed not only to relinquish that power he then had, of diminishing the then present rental of the same estates, by leasing them at the like rents as they were set for at the time of his marriage with Lady *Anne Hamilton*, but also by such intended settlement to secure to be paid out of a competent part of the said estates in the county of Antrim, into the hands of the Earl of *Belfast*, or for his use, for his support and maintenance during their joint lives, an annuity of 2000*l.*, but so as not to be liable to his debts, charges or engagements; and that provision should also be made in such intended settlement for raising forthwith, by mortgage of the premises to be therein comprised, the sum of 30,000*l.*, to be applied towards the payment of the debts of the Earl of *Belfast*, or otherwise for his benefit, and to covenant to keep down the interest thereof during his life; to which proposal the Earl of *Belfast*, after duly weighing and considering the same, had fully assented and agreed: and further reciting, that, in pursuance of that agreement, and in order to carry the same most effectually into execution, the deed of the 17th of May, 1792, had been executed: it was witnessed that, in further pursuance of that agreement for settling the estates comprised in the indenture of the 17th of May, 1792, and in consideration of ten shillings, the Marquis of *Donegal*, Lord *Archibald Hamilton*, and the Earl of *Belfast*, granted and released to Lord *Elcho* and his heirs the aforesaid several lands, hereditaments and premises, in the counties of Antrim, Down and Carrick-

argus, and all their estate, right, title, &c., to the same (but subject, nevertheless, to the term of 400 years created by the settlement of November, 1761, and the trusts thereof; and also subject to the appointment made for the jointure of *Barbara*, Marchioness of *Donegal*(a), and to the several leases of the premises then in being); to hold the same to Lord *Elcho* and his heirs, to the several uses, and upon the several trusts, and for the several ends, intents and purposes, and with, under and subject to the several powers, provisoes, conditions, limitations, restrictions, declarations and agreements, thereafter declared and expressed concerning the same: that is to say, as to that part of the mid estates situate in the town of Belfast, to the use of Sir *Charles H. Talbot* and *Jonathan Morgan*, for ninety-nine years, if the Marquis of *Donegal* and the Earl of *Belfast* should so long live; and as to the residue of the said states, to the use of the same trustees for a term of 1000 years; and, subject to said terms, as to all the estates, to the use of the Marquis of *Donegal* for his life; and after the termination of that estate in his lifetime, to the use of *Henry Skeffington* and *William J. Skeffington* and their heirs during his life, upon trust to preserve, &c.; and after his decease to the use of the Earl of *Belfast* for his life; with remainder to the same trustees and their heirs during his life, upon trust to preserve, &c.; and after his decease to the use of the first and other sons of the Earl of *Belfast* successively in tail male; and for default of such issue, to the use of Lord *Spencer Chichester* for his life; and after his decease to the use of his first and other sons successively in tail male; and, in default of such issue, to the use of the first and other sons of the Marquis of *Donegal* on the body

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(a) The second wife of *Arthur Marquis of Donegal*.

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of *Barbara* Marchioness of *Donegal* to be begotten, in tail male; and, in default of such issue, to the use of the Marquis of *Donegal*, his heirs and assigns, for ever. The trusts of the term of ninety-nine years were, to raise the annual sum of 2000*l.*, and pay the same to the Earl of *Belfast*, or for his use, for his support and maintenance, and so as not to be subject to his debts, contracts or engagements: and the trusts of the term of 1000 years were, to raise by sale or mortgage the sum of 30,000*l.*, and apply same towards the payment and discharge of the *bonâ fide* debts of the Earl of *Belfast*, or otherwise for his use. The settlement also contained powers authorizing the Marquis of *Donegal* to jointure an after-taken wife, and authorizing the other tenants for life to charge the lands with jointures and with portions for their younger children; also powers authorizing the several tenants for life, when in the actual possession of the estates by virtue of the aforesaid limitations, to demise the lands within the town of *Belfast* or adjoining thereto, on building leases, at the best rent; and to demise the other parts of the settled estates for any term not exceeding three lives or forty-one years, or for any number of years determinable on the fall of one, two or three lives, or for three lives, or sixty-one years absolute in possession, and at the best rent, without fine. And the Marquis of *Donegal* was empowered to demise *Island Magee* for any number of years not exceeding ninety-nine years, at a rent not less than the then yearly rent thereof. And the Marquis of *Donegal* covenanted with the Earl of *Belfast*, his heirs and assigns, that he would pay to the person who should advance the 30,000*l.*, or any part thereof, on the security of the lands comprised in the term of 1000 years, all interest which should, during his lifetime, become due thereon:

The 30,000*l.* was afterwards raised by mortgage of the term of 1000 years.

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By another indenture bearing date the 23rd of May, 1794, the estates in the counties of Donegal and Londonderry were resettled. A part of them, of the value of about 5000*l.* per annum, was limited to the Marquis of *Donegal* in fee: as to the residue of them, they were limited, after the decease of the Marquis, to the Earl of *Belfast* for life, with remainders to his first and other sons in tail, subject to a trust term to raise by sale or mortgage the sum of 40,000*l.*, to be applied in payment of the debts of the Earl of *Belfast*: and the Marquis of *Donegal*, in consideration of the resettlement, relinquished his power of leasing at the old rents, and his power to charge the estates with the sum of 30,000*l.*

Arthur Marquis of *Donegal* made his will, dated the 7th of August, 1795; and thereby, after reciting the 19 & 20 Geo. III. c. 32, and his claims thereunder, and the power to charge given by the twenty-third section of that Act, he gave and bequeathed, amongst other things, unto his eldest son, *George Augustus Chichester*, commonly called Earl of *Belfast*, all his, the said Marquis's, said share and shares, and all his right, estate and interest, of, in and to the said joint stock of the Company of Undertakers of the Lagan Navigation, and all and every sum or sums of money whatsoever, which at the time of his decease should or might belong to, or be in any ways due or payable to him under said Acts, or any debenture or debentures given or to be given to him in pursuance thereof, or otherwise howsoever, or by reason of his having advanced and paid any money towards completing the said navigation, and all his right, title and interest, in and to the said navigation and premises, and the monies,

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gains and profits, proceeds and produce thereof, and arising and accruing therefrom ; to hold unto his said son, *George Augustus* Earl of *Belfast*, his heirs, executors, administrators and assigns, for ever, according to the nature and quality thereof: and the testator thereby, in pursuance of the power given him by the Act, and of all other powers enabling him so to do, charged all his manors, lands, tenements and hereditaments, and real estates whatsoever, in the county of Antrim, and which then stood limited to him for life with remainders over, and through which the said navigation was carried on or passed, with the payment of the sum of 30,000*l.* for the use and benefit of his son, Lord *Spencer Chichester*, his then only younger child, his executors, &c., in whom he directed that the same should vest and be payable on his, the testator's, decease. He also devised to Lord *Spencer Chichester* and his heirs the estates limited to the testator in fee by the settlement of 1794, and the reversions in fee limited to him by that settlement and the settlement of 1792; and appointed him his sole executor.

Arthur Marquis of *Donegal* died on the 5th of January, 1799, leaving *George Augustus* Earl of *Belfast*, who thereupon became Marquis of *Donegal*, and Lord *Spencer Chichester*, his only children by Lady *Anne Hamilton*, him surviving.

The debentures in the Lagan Navigation came into the possession of Lord *Spencer Chichester* as executor of *Arthur* Marquis of *Donegal*. They remained in his possession for some time; but, after repeated applications for them by *George Augustus* Marquis of *Donegal* and by his agents, claiming them under the will of his father and as the consi-

deration for the charge of 30,000*l.* on the Antrim estates, such of them as were then in the possession of Lord *Spencer Chichester*, twenty-nine in number, for 1000*l.* each, were delivered to the Marquis. The other debentures, thirty-three in number, could not be found; and the Company having refused to issue new debentures to the Marquis of *Donegal* in their place, unless Lord *Spencer Chichester*, as executor of his father, consented thereto, he, on the 31st of May, 1810, executed an instrument under his hand and seal, authorizing the Company to transfer all the shares and interest of the late Lord *Donegal* appearing in the books of the Company to the Marquis of *Donegal*, and consenting that the Company should issue new debentures to the Marquis of *Donegal* in place of such of the former debentures as had been lost: and thereupon the Company, in September, 1810, issued new debentures to the Marquis of *Donegal*, in the place of those which had been lost, stating on the face of them that they were granted in lieu of the old ones. The Marquis of *Donegal* afterwards converted all the debentures to his own use. Interest was paid on the 30,000*l.* by the Marquis of *Donegal* up to the year 1811. Lord *Spencer Chichester* died on the 23rd of February, 1819, leaving four younger children, who were, under his marriage settlement, entitled to the charge of 15,000*l.* among them. At his death there was an arrear of interest due on the charge of 15,000*l.*

During his lifetime Lord *Spencer Chichester* granted several annuities, and charged his interest in the two sums of 5,000*l.* and 30,000*l.* with the payment thereof. He also mortgaged his interests therein, to secure the repayment of monies advanced to him; and being indebted to divers persons in large sums of money by judgment and otherwise, and being desirous to provide a fund for the liquidation of

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his debts, by indenture of the 4th of October, 1810, made between Lord *Spencer Chichester* of the first part, the several scheduled creditors of Lord *Spencer Chichester* whose names and seals were thereunto set and affixed, of the second part, and the plaintiffs, the Honourable *Montgomerie Stewart* and *James Kibblewhite*, of the third part, Lord *Spencer Chichester*, at the request and by the direction of the parties of the second part, assigned unto *Montgomerie Stewart* and *James Kibblewhite*, their executors, &c., his life interest in the sum of 15,000*l.*, and his contingent interest in the same, in the event of there being no issue of his marriage living at the time of his decease; and also the said sum of 30,000*l.*; upon trust thereout to redeem the several annuities granted by him, and then to apply the residue in payment of the scheduled and other debts of Lord *Spencer Chichester*, in the manner therein mentioned.

After the execution of this deed, Lord *Spencer Chichester* charged the surplus, which should remain after performance of the trusts thereof, with the payment of divers sums of money.

The original bill was filed in October, 1817; and the amended bill, upon which the cause was heard, was filed in August, 1831, by the trustees in the deed of October, 1810, and others, on behalf of themselves and the scheduled creditors in that deed, and other the creditors of Lord *Spencer Chichester*; and it prayed that the trusts of the settlement of November, 1761, and of the other deeds in the bill stated, regarding the sum of 15,000*l.*, might be carried into execution; and for an account of the sum due for interest thereon at the death of Lord *Spencer Chichester*; and that the principal and interest might be raised and applied according

the trusts of the marriage settlement of Lord *Spencer Chichester*, and the deeds of October, 1810, and the other deeds therein mentioned relating to the same ; and that the trusts of the will of *Arthur Marquis of Donegal*, so far as related to the said sum of 30,000*l.*, might be declared valid ; and that it might be declared that the said sum of 30,000*l.* was thereby well charged upon the lands and estates through which the Lagan Navigation passed or was carried on, in the county of Antrim ; and that same might be raised and applied according to the trusts of the deed of 1810, and the rights of the parties : and that, in case it should appear that *Arthur Marquis of Donegal* had no power to charge the settled estates with the said sum of 30,000*l.*, or that said estates were not liable to the payment of that sum under the Acts of Parliament and the will of the Marquis, then, that it might be decreed that the defendant, *George Augustus Marquis of Donegal*, by having accepted the debentures bequeathed to him by the will of his father, had elected to take under and abide by the will, and to make his estates liable to the charge of 30,000*l.* ; and that said charge, and the interest thereof, might accordingly be declared a valid charge on the life estate of the defendant, the Marquis of *Donegal* : or that, in any event, the Marquis of *Donegal* might be decreed to be personally liable to the payment of the said sum and interest.

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The right of the plaintiffs as to the charge of 15,000*l.* was not disputed : but the defendants, the Marquis of *Donegal*, and his son, the Earl of *Belfast* (who, under family settlements, were entitled to successive estates for life in the Antrim estates, with remainder to Lord *Chichester*, the infant son of the Earl of *Belfast*, in tail male), insisted by their answer, and in argument, that the 30,000*l.* was not a charge

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on the Antrim estates, because the Lagan Navigation did not pass through any part of the settled estates in the possession of the defendant, the Marquis of *Donegal*, unless the River Lagan might be considered as part of the Navigation; and secondly, that the settled estates ought not to be charged, if at all, with more than the sum which the stock and debentures to which the late Marquis was entitled, would have produced if sold on the day of his death; it being the intention of the Legislature, that the owners of settled estates through which the Navigation passed should give to their heirs an equivalent in value, in debentures or stock of the Company, for the sum charged by them on the settled estates for their younger children. These two objections were given up in the course of the argument, the Lord Chancellor having expressed a decided opinion against them. The defendant further insisted, first, that the late Marquis of *Donegal* did not comply with the condition which by the Act of Parliament was made necessary to the validity of the charge; namely, that the person making such charge should assign or bequeath to his heir such interest as he might then have in the joint stock of the Company: for that, at the death of the late Marquis, his son, the present Marquis, was strict tenant for life, and the first estate of inheritance was then in the defendant, the Earl of *Belfast*; and therefore, although the defendant, *George Augustus* Marquis of *Donegal*, was then the heir at law of the late Marquis, he was not his heir within the true construction of the Act of Parliament; the object of the Act being, that the interest in the stock so assigned or bequeathed should go along with the estates charged. Secondly, that the power to charge was extinguished by the recoveries of 1791 and the settlements of 1792; or, if not, that the settlement of 1792, amounted to a contract not to execute the power so far as the same

and reference to the advances made by the late Marquis prior to its execution; and that the charge by the will could only be supported to the extent of advances made after May, 1792. Thirdly, that Lord *Spencer Chichester*, by joining with the defendant, the Marquis of *Donegal*, in his application to the Company for new debentures in lieu of those which had been lost, concurred in an act whereby the debentures were placed in the power of the Marquis of *Donegal*, and enabled him to commit a breach of trust, and appropriate them to his own use; and that to the extent of those debentures, the benefit of which was thus lost to the owners of the inheritance, the charge of 30,000*l.* was invalidated.

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The Duke of *Hamilton* was made a party, as heir at law of the surviving trustee to preserve contingent remainders in the settlement of 1761; the Earl of *Wemyss*, as heir at law of Lord *Elcho*; and Lord *Massarene*, as heir at law of the surviving trustee to preserve, &c., named in the settlement of the 19th of May, 1792.

The case was argued in Easter Term, 1844. The cause then stood over to add parties. In the mean time and before the present argument, *George Augustus* Marquis of *Donegal* died.

Mr. Sergeant *Warren*, Mr. *Moore*, Mr. *Nelson*, Mr. *Dix* and Mr. *Christian*, for the plaintiffs. Argument.

The Solicitor General (Mr. *Greene*,) Mr. *Gilmore*, Mr. *Brooke* and Mr. *F. W. Walsh*, for the principal defendants.

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The following cases were referred to: *Galway v. Baker(a)*; *Bickley v. Guest(b)*; *The Case of the Chancellor of Oxford(c)*; *New River Company v. Graves(d)*; *Counden v. Clarke(e)*; *The Attorney General v. Hall(f)*; *Taylor v. Webb(g)*; *Beale v. Beale(h)*; *Brownsword v. Edwards(i)*; *Doe v. Martin(k)*.

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THE LORD CHANCELLOR :—

The right to the 15,000*l.* provided for younger children by the settlement of 1761, is not disputed. The contest is as to the 30,000*l.* charged by the will of 1795 upon the Antrim estates comprised in the settlement of 1792. By the settlement of 1761 the estates in question, which comprised the River Lagan and the soil thereof, were limited to the first Marquis, then Earl of Donegal, for life; with remainder (subject to a jointure rent-charge, and portions for younger children) to his first and other sons in tail male; with remainder over. Lord *Donegal* had powers reserved to him to jointure an after-taken wife, and to charge portions for younger children, and to grant building and other leases, as to some of which he was bound only to reserve the present rents; and a separate power of leasing was reserved to him over Island Magee. The Lagan Navigation Act passed in 1779–80, by which power was given to every

(a) 7 Cl. & F. 379; S. C. West. 467.

(b) 1 R. & My. 440.

(c) 10 Rep. 53, 57 b.

(d) 2 Vern. 431.

(e) Hob. 29, 31.

(f) Note to *Ross v. Ross*, 1 Jac. & W. 158.

(g) Styles, 319.

(h) 1 P. Wms. 244.

(i) 2 Ves. 243.

(k) 4 T. R. 39.

scriber to the Navigation, through whose lands the Navigation should pass, to charge his real estate for the use of his younger children with such sums which he might have in the joint stock as he should assign or bequeath to his heir. This power, I may observe, was an enabling one; a man whose estate was not in settlement could charge as he pleased without the aid of the Act: its object properly was, that the proprietors of estates through which the Navigation should pass, should have a property and interest therein. Bearing in mind that the power was intended to apply to estates in strict settlement, the object, as expressed, explains the sense in which the word *heir* is used; it means the heir to the estate, and as *nomen collectivum* would include, as far as the law would permit, all persons claiming in succession under a settlement; for it could not have been intended that a tenant for life, although legally heir, should take the absolute interest in the Navigation shares under an exercise of the power, whilst the remainder-man in tail should bear the burden of the charge without the benefit of the supposed equivalent: that would not effectuate the intention that the proprietors of estates through which the Navigation passed should have a property therein. The power was incident to the estate; for not only a person through whose lands the navigation passed could exercise it. Like all powers for the benefit of a man's family over his settled estates, it was in the nature of a benefit to himself; but its operation was to enable him to exchange his shares in the Navigation for a charge on the land for his younger children. The actual provision was a move from himself, viz., the equivalent to the heir; but the Act of Parliament enabled him to exchange it for a charge on the land as between the eldest and the younger children. It was not denied that this power was one which

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the donee might release or contract not to execute; and in that view I concur.

The questions which I still have to consider are, first, whether the first Marquis, by his subsequent acts, destroyed or released his power as to advances before the settlement of 1792; for it was admitted by the counsel for the defendant that the power under the Act remained as to advances subsequently to that settlement: and secondly, whether as to subsequent advances the power was well executed by the Marquis's will: and thirdly, if it was, whether Lord *Spencer Chichester* could claim the benefit of the charge in consequence of his having consented to new debentures being granted to the second Marquis.

It was insisted for the defendant that the power was destroyed by the recovery; whilst for the plaintiff it was argued that the power was in its nature simply collateral, and being created by Act of Parliament, could not be affected by the recovery. I have already stated my view of the nature of the power: I think it was not intended to be destroyed by the recovery; and that the recovery would not have that operation contrary to the intention of the parties. It was then insisted that it was in effect extinguished by the deeds of 1791 and 1792. The deed of May, 1791, for making a tenant to the *præcipe* was expressly made subject to Lord *Donegal's* power to raise 30,000*l.* for his own benefit out of another estate in the settlement of 1761, which shows that he did not by the deed and recovery intend to affect his ownership. The recovery was to enure to Lord *Donegal* for life; remainder as Lord *Donegal* and Lord *Chichester* (afterwards Marquis of *Donegal*) should appoint; and in default of and until appointment, to the uses, and subject

the powers, in the settlement of 1761: and it was provided that, until appointment, Lord *Donegal* might exercise all the powers reserved to him by the settlement of 1761. This, I think, shows that the parties did not intend to disturb any of Lord *Donegal's* powers, although they only adverted to those created by the settlement of 1761. But by the frame of the deed and the intention of the parties, even the latter were only to remain until appointment. By a deed of 17th of May, 1792, Lord *Donegal* and his son appointed the estates (subject to the estate for life of Lord *Donegal*, and to the several powers of leasing, and mortgaging and charging, and all other the powers vested in or belonging to him at the execution of the deed, whether they were appendant to his estate for life or relating thereto, or in gross, or otherwise howsoever) to Lord *Archibald Hamilton* in fee, in order that he might join in the intended settlement of the estates. This deed was altogether an unnecessary one; but it clearly proves that the parties did not intend, previously to the settlement, to affect any power vested in Lord *Donegal*. The power under the Lagan Navigation Act was, I think, included with all other powers vested in Lord *Donegal*, and was saved by the deed.

I take a different view of the settlement of the 19th of May, 1792. It recites Lord *Donegal's* powers under the settlement of 1761, and his right to fine down the leases of part of the estates, and the agreement to settle the estates on the uses, and subject to the powers, &c., after contained. The deed then, which was made for valuable considerations moving from both father and son, proceeds to convey the estates in strict settlement; under which Lord *Donegal* was made tenant for life, with remainder to the late Marquis for life; with remainder to his first and other sons in tail

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male ; with remainders over : and the conveyance was made subject to the term for raising portions for younger children under the settlement of 1761, and to the jointure provided for Lord *Donegal's* second wife under the power in that settlement. But there is no saving of any power vested in Lord *Donegal* under the settlement of 1761 or otherwise, and a new power of jointuring is reserved to him ; there are also new powers of leasing expressly requiring the then greatly improved rent to be reserved, when before the resettlement he might have reserved the old rent and taken fines : and there is a separate power to the Marquis to demise Island Magee. The usual powers are reserved to the other tenants for life. Now by force of this settlement, I am of opinion that the old powers in the settlement of 1761, and by a parity of reason the power as to past advances in the Navigation Act, were destroyed. The operation of the deed as a conveyance by Lord *Donegal*, the tenant for life, and Lord *Archibald Hamilton*, the remainder-man in fee, was to exclude and destroy all powers vested in the tenant for life ; they were not saved, and he could not exercise them contrary to his own grant. The reservation of new powers for the old purposes, but under other restrictions, proves the intention to have been to extinguish the old powers and to give to Lord *Donegal* only the powers created by and depending upon the settlement. It appears clear to me that the power under the Navigation Act as to past advances is subject to the same law. It was saved with the other powers until the resettlement, and it afterwards fell with them. The estates were intended to be resettled subject only to the new powers. I am, therefore, of opinion that the charge by the first Marquis on the settled estate was void as to advances previously to the resettlement. As I have already observed, it was admitted that the power

under the Act remained as to future advances; for, independently of contract, this power had just the same operation upon the new settlement as it originally had upon the old one. The question then is, was it well executed by the will? The words of the Act are literally complied with; for the Navigation shares are given to the heir; and he was both heir in the technical sense, and heir as regarded the right to the estate: he was the eldest son and tenant for life of the estate. But the Act did not intend that he should take the whole interest in the shares when he was but tenant for life of the estate; although that intention is to be implied, and is not expressed. But the Act, I think, must be held to effectuate its own intention; and, therefore, the gift in the will to Lord *Belfast*, his heirs, executors, administrators and assigns, will, I think, enure according to the title, for the benefit of the remainder-man under the settlement, who takes subject to the charge; just as a reservation of rent in a lease under a power to the tenant for life, his heirs and assigns, would be deemed tantamount to a reservation to the persons entitled in remainder. The power is expressly referred to, and, therefore, no one could acquire the shares under Lord *Donegal*, with notice of the will, without notice that he was but tenant for life of them. If the power was well executed, the younger children entitled to the charge cannot be affected by an improper disposition of the shares by the tenant for life.

This brings me to the last question, viz., that Lord *Spencer Chichester* lost his right to the charge by concurring in vesting the shares in, and obtaining new ones to be granted to his elder brother, Lord *Donegal*. It does not appear to me that his acts had that operation; for he joined only as executor of his father; and it merely was to transfer the shares

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to the Marquis under the bequest in the will ; and the authority to grant new debentures in the place of some which were lost, did not, I think, affect his claim : the new debentures were expressed on the face of them to be merely to supply the loss. There was no fraud on the part of Lord *Spencer Chichester*, nor such an act as could amount to a release or waiver of his claim to the charge in his favour : indeed this point was made at the close of the argument and was not urged by either of the leading counsel for the defendant ; but I have given to it the same consideration which I have bestowed on the other points. The result is, that the plaintiffs will be declared to be entitled to the charge, as far as it was represented by advances subsequently to the settlement of 1792 ; and it must be referred to the Master to inquire what advances were so made. The other accounts and inquiries will be of course.

After the disposition of the principal points in the case, some questions arose as to costs. THE LORD CHANCELLOR held,—First, that trustees to preserve contingent remainders were not necessary parties to the suit ; that they stood in the same situation as relessees to uses ; and that the plaintiff should pay their costs and not have them over. Secondly, that so much of the costs of the suit as related to the raising of the 30,000*l.* out of the estate, should be borne by the estate ; and that so much of the costs as were occasioned by bringing before the Court incumbrancers on the charge of 30,000*l.* should be borne by the charge. That in a foreclosure suit the case was different, for the mortgagor, being in default, not having paid the money when he ought, must pay the costs occasioned by any assignments of the

mortgage which had been made,—he must pay *all* the costs of the suit. But this was the case of a charge upon a family estate; and the difficulties in raising it had been created by the family instruments.

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The notes of the decree were afterwards spoken to with reference to a question of election, arising upon the will of *Arthur Marquis of Donegal*, and a reference upon the subject was directed.

Extract from the Decree.—Declare that the charge or sum of 30,000*l.*, in the said will and in the pleadings mentioned, to the amount of all sums subscribed or advanced by *Arthur*, late Marquis of *Donegal*, towards carrying on the Landed Navigation, in the pleadings mentioned, subsequent to the indenture of re-settlement bearing date the 19th of May, 1792, well charged, by virtue of the Act passed in the ninth and twentieth years of the reign of his late Majesty, King George the Third, and the will of the said *Arthur*, late Marquis of *Donegal*, on the estates in the county of Fermanagh, in the pleadings in this cause mentioned, and comprised in the said settlement bearing date the 12th of November, 1761. And it is further ordered and decreed, that it be referred to the Master to take an account of all sums subscribed or advanced by the said *Arthur*, late Marquis of *Donegal*, in or towards carrying on said Navigation from the said 19th day of May, 1792, to his death; and also take an account of what is now due for principal and interest on so much of the said charge or sum of 30,000*l.* as was equal in amount to the sums so subscribed or advanced as aforesaid. And it is further ordered and decreed, that the said Master do inquire and report whether the late Marquis of *Donegal* elected to take under the will

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of his father, *Arthur Marquis of Donegal*, or not; and in case he did elect, then and in such case it is further ordered that the said Master do inquire and report in what manner any payments made by him on account of said charge or interest thereof are to be attributed; and in case the Master shall find that the late Marquis of *Donegal* did not elect to take under the said will, then and in such case it is further ordered that the said Master do inquire and report in what manner such payments are to be attributed. [The plaintiffs were decreed their costs in the cause.] And it is further ordered that the defendants, the Duke of *Hamilton*, the Earl of *Wemyss* and Viscount *Massarene* do have their costs against the plaintiffs, the plaintiffs not to have the same over against the estates. And the Court doth declare that all the other defendants are entitled to their costs in manner following, that is to say: such of them as were made parties only as being interested in the said charges of 15,000*l.* and 30,000*l.*, or either of them, to have their costs against the charge or charges in respect of which they were made parties; but all the said other defendants, save as hereinbefore particularly mentioned, to have their costs out of the said estates.—*Reg. Lib.* No. 69.

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COSTELLO, Petitioner; BURKE, Bart., Respondent.
DOWELL v. BURKE.

IN the year 1806 Sir *John J. Burke* executed his bond and warrant to *John Doolan*, in the penal sum of 1600*l.*, conditioned for the payment of the principal sum of 800*l.*, with lawful interest. Upon this bond judgment was entered in Michaelmas Term, 1806: and that judgment afterwards became vested in the petitioner, *James Costello*; who in November, 1837, presented a petition under the 5 & 6 Will. IV. c. 55, praying for a receiver over certain lands, which, at the time of the rendition of the judgment, were the estate of the conusor, but had afterwards been sold and conveyed by him to *Allen Dowell*. The affidavit verifying the petition stated the amount of the sum claimed to be due for principal, interest and costs, on foot of the judgment; and on the 24th of November, 1837, a conditional order was made for the appointment of a receiver over the lands or a competent part, "to pay the sum of 1506*l.* 18*s.* 5½*d.*, stated to be due to the petitioner, for principal, interest and costs, on foot of the judgment."

In consequence of the absence of the respondent from the country, this conditional order could not be served upon him. It was renewed by order of the 9th of Septem-

November 3.
In a petition matter a conditional order for the appointment of a receiver to pay the sum of 1506*l.* "stated to be due to the petitioner," on the judgment, was made absolute; with liberty to the Master, at the instance of the respondent, to ascertain the sum due.

The respondent is not precluded from relying on the 3 & 4 Will. IV. c. 27, s. 42, in the office, as a bar to more than six years' arrears of interest, though he did not rely on it in showing cause against the conditional order, and the sum stated in the order was much more than the principal money and six years' interest thereon.

The Court having, at the instance of the respondent, restrained the petitioner from proceeding on the order for the receiver, the respondent undertaking to pay him a certain annual sum; the petitioner is not entitled to appropriate the monies paid him, pursuant to that order, to the discharge of interest which had accrued due more than six years before the making of the conditional order.

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ber, 1839 ; and service of that renewed order on the respondent, and on *Allen Dowell*, the purchaser, having been effected, cause was shown against making it absolute by *Allen Dowell* ; viz., that there were other estates of which the respondent was seised at the time of the rendition of the judgment, which had been conveyed to a trustee, upon trust to indemnify the lands sold to him against all incumbrances ; and that he had instituted a suit (*Dowell v. Burke*) for the sale of those lands, and that all the incumbrancers except the petitioner had proved their demands under the decree which had been pronounced in that cause ; and that the petitioner ought to resort to those lands for payment of his demand. He did not make any objection to the amount of the sum claimed to be due on foot of the petitioner's judgment. On the 31st of January, 1840, the conditional order of the 9th of September, 1839, was made absolute ; and it was referred to the Master to approve of a proper person to be appointed receiver : and it was ordered that the Master be at liberty, at the instance and request of the respondent, to inquire into and ascertain what was due to the petitioner for principal, interest and costs, after all just allowances.

By another order of the 6th of May, 1840, it was ordered that the petitioner be stayed from proceeding in the matter for a receiver, upon the terms of *Allen Dowell* paying to the petitioner the sum of 350*l.* per annum (that being the rental of the lands over which it was ordered that the receiver should be appointed), by half-yearly payments, he undertaking so to do.

On the 21st of June, 1843, *Edmund Dowell*, the son and heir of *Allen Dowell*, who had died, obtained an order

of reference to the Master, to report the sum due to the petitioner on foot of the judgment, and also to tax the petitioner's costs.

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Under this order the petitioner filed a charge claiming the sum of 1506*l.* 18*s.* 5½*d.*, mentioned in the conditional order of November, 1837, and subsequent interest on the principal sum of 800*l.*, late currency; and he appropriated the payments made to him under the order of May, 1840, first in discharge of the interest, and afterwards in reduction of the principal. By his discharge, *Edmund Dowell* insisted that the petitioner was only entitled to recover interest from the period of six years antecedent to the date of the conditional order of 1837; and he relied on the 3 & 4 Will. IV. c. 27, s. 42.

The Master reported that the sum of 202*l.* 6*s.* 4*d.* was due to the petitioner for principal, interest and costs; and disallowed his claim for interest beyond six years before the conditional order of November, 1837.

To this report the petitioner objected: and the objections having been over-ruled, it was now moved, by way of appeal from the decision of the Master of the Rolls, that the report of the Master be set aside or varied, pursuant to the objections taken to it. By his objections the petitioner insisted, that the Master was not justified in reducing his demand by the aid of the Statute of Limitations.

Mr. *Baker* for the petitioner.

Argument.

The order of November, 1837, which was afterwards made absolute, is for the appointment of a receiver to pay

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a certain specified sum. It is a judgment ascertaining that, at that time, the particular sum specified was due to the petitioner. The respondent, or those deriving under him, when showing cause against the conditional order, might have insisted that so much was not due to the petitioner, and might have relied on the 3 & 4 Will. IV. c. 27, s. 42; but, not having done so then, it was not competent for them to set up the defence of the Statute in the office; for the statute must be relied on as a defence at the first opportunity of doing so: *Prince v. Heylin(a)*; *Walsh v. Walsh(b)*; *Harrison v. Boswell(c)*. The direction to the Master to take the account of the sum due, contained in the absolute order, was for the benefit of the respondent, in case, after payments made on account by the receiver, he should desire to know the amount remaining due. It is the same reference which is now embodied in the 155th General Rule. The petitioner has also a right to appropriate the payments of the 350*l.*a-year, voluntarily made to him by Mr. *Dowell*, to the discharge of the interest, even though his claim in that respect was barred by the Statute: *Mills v. Fowkes(d)*; *Philpott v. Jones(e)*.

Mr. Sergeant *Warren* and Mr. *O'Brien* for Mr. *Dowell*.

The order is for the appointment of a receiver to pay a specified sum *stated to be due* to the petitioner; it is not a conclusive ascertainment of the amount then due. It would not have been proper to rely on the 3 & 4 Will. IV. c. 27, s. 42, on showing cause against making the conditional order absolute; for the objection only goes to the *quantum* of the demand, not to the right of the petitioner to a receiver;

(a) 1 Atk. 493.

(d) 5 Bing. N. C. 455.

(b) Jones & C. 52.

(e) 2 A. & E. 41.

(c) 10 Sim. 382.

and it has been held that the bar of the Statute may be set up for the first time in the office: *Burne v. Robinson*(a). There is no right to appropriate the payments in this case; they are payments made by the direction of the Court: *Trapaud v. Cormick*(b); *Gregg v. Glover*(c).

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—
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Mr. D. R. Kane in reply.

THE LORD CHANCELLOR :—

I think that Mr. Dowell, from the peculiar situation in which he stands, is bound, if he can maintain this objection, to insist upon it; because he claims under Sir John J. Burke, and though he is entitled to an indemnity against this demand, he is also bound to protect the estate, which he alone at present represents. I am not at liberty to take from a party the defence which the Statute of Limitations gives him. Mr. Dowell had a right to insist upon the Statute, and the question is, whether he has lost that right. The proceeding under the Receiver Act is *ex parte*. An order for hearing a petition for the appointment of a receiver had been made, to obtaining which it is necessary that the party seeking for it should swear to the amount of the sum which was actually due. But the affidavit is not conclusive as to the amount of the sum really due; and the party who has to answer the demand has a right to come in and show cause against the appointment of a receiver. I agree with the authorities, that a party insisting upon the Statute of Limitations, as a bar to a demand against him, must set up that defence upon the first opportunity; otherwise, a party might be contesting a question of right, when in fact there was no legal question to be decided; for if the Sta-

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(a) 1 Dru. & W. 688, 699.

(c) Fl. & K. 614.

(b) 1 Hog. 277.

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tute be a bar, the cause ought to stop when the defence is set up. I am not called on, nor do I mean to say what might be the effect of an order for payment of a particular sum, where the particular circumstances of this case do not exist: but here there is ultimately an absolute order made, not for payment of the sum which the party swears to be due, but with a reference to the Master to ascertain the sum which really is due for principal, interest and costs. It has been said this addition is similar to the General Order of the Court: that does not affect its efficacy. What may be the effect of that General Order, I am not called upon to decide; but can it be seriously disputed that, under the order in this case, the Master was at liberty to consider what was the sum actually due? This is not a solemn pleading, but a summary remedy given by the Statute. I conceive that, in proceedings of this nature, though a party shows cause against the appointment of a receiver, he is entitled to have the sum legally due by him ascertained by the Master; and that necessarily raised the question under the Statute of Limitations. Then it was said that the respondent has waived his right to make this objection, because he submitted to pay an annual sum to the petitioner equal to the entire rents of the estate. That is merely a substitution for the order which would have been made. It is a submission to pay all that he would be directed by the order of the Court to pay. Whatever may be the authority of a party to appropriate payments to demands barred by the Statute, the cases on that subject do not apply to the present, where the party has been acting under the order of the Court. I think that the respondent is entitled to the benefit of the Statute, and that the order of the Master of the Rolls is right.

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CORBET *v.* MAHON.

COWAN (Clerk) *v.* MAHON.

ALLOT, Petitioner; MAHON, Respondent.

ALLOT *v.* MAHON.

November 4.

A bill in the first cause was filed to raise the arrears of rent-charge granted by deed of the 25th of July, 1839. An annuity affected the life estate of the grantor in the charged. The bill in the second cause was filed to an arrear of tithe rent-charge.

A receiver was appointed in a cause instituted by an annuitant, whose annuity affected the life estate, and was extended to the matter of a prior judgment creditor, whose judgment affected the inheritance. The rents received must be applied according to the legal rights of the parties; and the Court cannot, against the consent of the judgment creditor, apply the rents, first in payment of the interest on the judgment debt, and then of the demand on the life estate.

A petition in the matter was for a receiver on a judgment of Trinity Term, 1815, for the penal sum of 860*l.* The judgment affected the inheritance in the lands.

A receiver had been appointed in the first cause, and afterwards extended to the other cause and matter.

A sum of 250*l.* being in the hands of the receiver, it was on the 24th of June, 1845, ordered by the Master of Chancery, that out of that sum, the receiver should, after paying to the plaintiff in the second cause the full amount of his demand, pay to Miss *Allot*, the petitioner, the sum of 250*l.* being in full for interest due to her on her judgment and for the 7th of June, 1845; and that the balance remaining after such payment should be paid by the receiver to the plaintiff in the first cause, on account of his demand.

Miss *Allot* now moved, by way of appeal, that the residue of the sum in the hands of the receiver, after

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paying the demand of the plaintiff in the second cause, be paid to her on account of her demand on foot of her judgment.

Mr. Sergeant *Warren* and Mr. *Hawkins* for Miss *Allot*.

Mr. *Monahan* and Mr. *Corbet* for the plaintiff in the first cause.

The Court has a discretion, under the 5 & 6 Will. IV. c. 55, to appoint a receiver over the whole, or a part only, of the debtor's estate. That implies that they have a discretion to allocate the funds brought in by the receiver amongst the several creditors. Here the plaintiff in the first cause has only the life estate of the grantor to look to for payment, whereas the judgment affects the inheritance. In the case of a plenary suit the Court will not direct principal monies to be paid out of rents and profits by a receiver.

Mr. *Hawkins* in reply.

Judgment.

THE LORD CHANCELLOR :—

This case, although relating to a small sum of money, involves a principle of much importance. The Act of Parliament which enabled a judgment creditor to come to this Court for a receiver, instead of suing out an *elegit*, gave him a right to have the rents of the land for the payment of his debt. If the old remedy had remained, and the judgment creditor had sued out an *elegit*, he would have obtained possession of the land, and be entitled to retain it against every person not having a prior claim. There could not, in such a case, have been any appropri-

on of the rents to meet the peculiar circumstances of the
e; the right alone could have decided the question of
ropriation. The Act of Parliament intended to sub-
stitute an easy remedy for the former difficult one; but
the right remains the same; and in order to prevent any
inconvenience which might arise from the exercise of the
remedy given by the Act, the Legislature expressly autho-
red the Court to exercise its discretion in limiting the
quantity of the estate over which the receiver should be
appointed; and it is the constant habit of the Court not to
appoint a receiver for payment of a small demand over the
whole of a large estate, but only over a sufficient portion to
answer the demand within a short and reasonable period.
Here, however, a receiver has been appointed over a part
of the estate, the practice is, to extend that receiver to the
remaining portion, when another creditor comes in; but
this is done in order to save the expense of a new appoint-
ment; otherwise there would be several receivers on the
same lands, although over different portions of it. In the
present case a person having a charge on the life estate
obtained a receiver for payment of it; and then a prior judg-
ment creditor, whose demand affected the inheritance, ob-
tained an order extending the receiver to his matter. That
must be considered as an original appointment, and no per-
son disputes that the prior creditor must be paid in prefer-
ence to the incumbrancers claiming under the tenant for
life. They cannot stand in a better situation than the tenant
for life. Suppose the tenant for life had asked that the
whole of the rents should not be paid over to the prior cre-
ditor, but that a portion of them should be paid to himself,
would the Court have complied with his request? If it be
ordered that the owner of the lands should enjoy a portion
of the rents, the order appointing the receiver over the

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whole of the lands must be discharged, and his appointment be limited to so much of the estate as may be thought proper. While the order remains, the Court could not, on behalf of the tenant for life, interfere to prevent the judgment creditor from levying the whole of the rents for payment of his demand; and if the tenant for life have not that equity, no incumbrancer claiming under him can have it.

I regret being under the necessity of altering this order, which was clearly designed to meet the exigency of the case; but the prior creditor insists upon his strict legal right, and I have no authority but to appropriate the rents according to the legal rights of the parties. It is dangerous to assume a jurisdiction to decide the case according to my own impression of what is just, or on some supposed analogy, especially as the party applying, if he have the right which he claims, has a direct and immediate remedy. I must, therefore, reverse the order of the Master of the Rolls.

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Lessee for years demised the lands for his entire term, reserving a rent, with the usual powers of distress and entry; and the rent having become in arrear, filed a bill for a receiver; and moved upon the answer accordingly. The application was refused, the Court doubting whether the bill could be sustained, as the plaintiff had a remedy at law.

EDWARD WALSH, being seised in fee of the lands of Milane, by indenture of lease, dated the 23rd of March, 1782, demised the same to *William* and *Arthur Johnson*, their executors, &c., for the term of 900 years from the 25th of March, then instant, at the yearly rent of 134*l.* 13*s.* 6*d.*

A motion for a receiver will not be granted upon an equity appearing on the answer, which is not relied on in the bill.

Villiam Johnson died in 1790, and *Arthur Johnson* became entitled to the entire interest of the lessees, by survivorship; and by indenture dated the 24th of April, 1800, he leased a part of the same lands to *Thomas Hawkes*, his executors, &c., for the term of 879 years from the 5th of February, 1814 (which, in that indenture, was stated to be the entire residue of the term of 900 years), at the yearly rent of 85*l.* 2*s.* 3*d.* This lease contained the usual clauses of distress and entry in case of non-payment of the rent reserved; and also a covenant by *Thomas Hawkes*, for himself, his executors, administrators and assigns, to pay the same during the continuance of the term.

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All the estate and interest of *Arthur Johnson* under the lease of 1782, afterwards became vested in *George Johnson*, who, by indenture of the 13th of November, 1824, assigned the same in mortgage to *James Cremen*, to secure the repayment of a sum of 400*l.* *George Johnson* died in 1827, and his widow, *Sophia*, obtained administration to him.

Thomas Hawkes died, and *John Hawkes*, his son, entered into possession of the lands mentioned in the indenture of the 24th of April, 1800.

John Hawkes for some time paid the rent of 85*l.* 2*s.* 3*d.* to *George Johnson*, and after his decease, to *Sophia Johnson*.

He afterwards suffered an arrear of it to become due; there being a receiver over the lands, appointed under the Mortgage Act upon the petition of *James Cremen*, the receiver, pursuant to the directions of the Master for that purpose, brought an ejectment for non-payment of rent against him. To this ejectment *John Hawkes* took defence, and openly stated that he would defeat the receiver in it,

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as the lessors of the plaintiff had not any reversion in the lands. The counsel for the receiver advised that the objection was valid; and thereupon the ejectment was abandoned, and the present bill was filed by *James Cremen* and *Sophia Johnson* against *John Hawkes*, stating the foregoing matters, and that the plaintiffs were ignorant of the title under which *John Hawkes* had entered into possession of the lands; and charging that the lands comprised in the indenture of 1800 were, previously to its execution, underlet to tenants for terms still subsisting, and that the counterparts of their leases were not in the possession or power of the plaintiffs; that the plaintiffs were ignorant of the precise nature of the title of *Edward Walsh* to make the lease of 1782; and that there were outstanding legal terms, of which they were ignorant, which might be set up to defeat their rights at law. The bill prayed that an account might be taken of the sum due on foot of the rent or rent-charge of 85*l.* 2*s.* 3*d.*, and that same might be decreed to be well-charged on the lands; and for a receiver.

John Hawkes, by his answer, admitted the facts stated in the bill, and that he threatened to set up the want of reversion in the lessors of the plaintiffs as a defence to the ejectment, but only for the purpose of obtaining time to pay the rent. He said that he entered into the lands, being entitled to an equitable interest in them under his father's will, which had not been proved; and submitted that, even if there were outstanding legal terms or tenants' leases (which he did not admit), the plaintiffs' remedy was at law.

Upon the coming in of the answer, the plaintiffs moved at the Rolls for a receiver, pursuant to the prayer of the

11; which was refused (*Cremen v. Hawkes*, 8 Ir. Eq. R., 53); and the application was now renewed before the Lord Chancellor.

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Mr. Sergeant Warren, Mr. Brooke, and Mr. A. Maley,
for the plaintiffs.

The plaintiffs could not maintain an action at law against the defendant, who, as it appears, is only entitled to an equitable interest in the lands under a will which has not been yet proved. If charged as assignee, he might, by proving the will and producing it, show that he was not assignee; and an ejectment for non-payment of rent, will not lie, as there is no reversion: *Fawcett v. Hall*(a). The single circumstance that the defendant is entitled to the equitable interest in the lands, is sufficient to give the Court jurisdiction: *Clavering v. Westly*(b). [The LORD CHANCELLOR.—That is not the equity stated in the bill. Is there any precedent for a bill like this?] *Stevelly v. Murhy*(c) is in point. There a bill like the present was sustained. The only difference between the two cases is, that there the rent was reserved upon a fee-farm grant, here upon the assignment of a long term of years. The indenture of the 24th of April, 1800, though in form a lease, is, in operation of law, an assignment; and the rent hereby purported to be reserved is a rent-charge, and not rent-service; and it has been settled, after some struggle, that Courts of Equity have concurrent jurisdiction with Courts of law, in giving relief in matters of rent-charge: *Manly v. Hawkins*(d); *Fay v. Fay*(e); *Cupit v. Jackson*(f).

(a) Al. & Nap. 248.

(b) 3 P. Wms. 402.

(c) 2 Ir. Eq. R. 448.

(d) 1 Dru. & Wal. 363.

(e) 2 Jones, 350.

(f) 13 Pri. 721.

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Mr. *Martly* and Mr. *John R. Atkins*, for the defendant.

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The plaintiffs have a complete remedy at law. They may distrain for the rent. The decision of the House of Lords in *Pluck v. Digges*(a), reversing the judgment of the Court of Error in this country(b), only establishes that, in a case like the present, the landlord cannot avow generally; but he may still avow at common law. The decision in that case was not approved of in this country; and the Court of Exchequer declined to apply its principle to the case of ejectment for non-payment of rent: *Lessee of Walsh v. Feely*(c); *Lessee of Coyne v. Smith*(d). According to those decisions, the plaintiffs may also maintain an ejectment for non-payment of rent under the Statutes: but at least they may enter at common law for condition broken. Also they may maintain debt for the rent: *Clarke v. Coughlan*(e); *Newcombe v. Harvey*(f); *Baker v. Gosling*(g). This case is different from *Cupit v. Jackson*, which was a grant of an annuity charged upon lands; but even that case was doubted by Sir *A. Hart* in *Roberts v. Hughes*(h).

THE LORD CHANCELLOR :—

Whether this bill can be maintained is a question which I will not decide on this motion, but leave it to be determined when the cause comes regularly to a hearing.

There is nothing peculiar in the circumstances of this case. A man, believing that he can grant a lease of a

(a) 5 Bligh, N. S. 41.

(b) 2 Hud. & Br. 1.

(c) 1 Jones, 413; 3 Law Rec.
N. S. 233; S. C.

(d) Batty, 90, n.

(e) 3 Ir. Law R. 427.

(f) Carth. 161.

(g) 1 Bing. N. C. 19.

(h) 2 Moll. 488, n.; see *Roberts v. Hughes*, Beatty, 417.

certain duration, grants it for a longer term than he had in the lands, reserving a rent, with powers of distress and entry. The operation in law of that instrument is, to assign all his interest in the lands, and leave no reversion in him: but still it operates, in some sense, as a lease. I never doubted that there was a remedy for the recovery of the rent by the grantor, against the grantee or intended lessee. In this country it was doubted whether the lessor was not, in such a case, entitled to the benefit of the statutable remedies between landlord and tenant; but that doubt was set right by the House of Lords. It was said there is a difference between the law in England and Ireland in this respect; for that here it was the constant course to insert a clause of distress in all leases, whereas it is omitted from English leases. But I am not aware of any difference in the law of England and Ireland, in this respect. It is just as usual to insert a clause of distress in a lease in England, as in Ireland. The point, therefore, appears to be the same in both countries.

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In the course of my experience, I have often known the difficulty from a want of reversion to arise; but, although the remedy at law was in some cases very difficult, I never heard of any person filing a bill upon this abstract point. I therefore asked Mr. Sergeant *Warren*, whether any such case had come within his experience, but his answer was not very satisfactory. I hold it to be a good rule, not to allow at this day that which has not previously been allowed. I think the Court possesses jurisdiction enough; and though it has been said, that it is the part of a good Judge to extend the jurisdiction of the Court, I do not consider it to be my duty to extend my jurisdiction, but to hold fast by that which my predecessors have

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established. My strong impression is, that this bill cannot be maintained ; and in saying that, I have no intention to impeach any of the authorities here, or in England. I have myself made decrees in annuity suits, and I think the jurisdiction of the Court in this respect is perfectly settled; whether upon good and satisfactory grounds I am not called upon to say: but I am prepared to follow what has been decided.

I shall not grant a receiver upon this motion : if the plaintiffs believe that the bill is well founded, let them bring it to a hearing. It is said, that there is a distinction in this case; for that the party in possession is a *cestui que trust*. That is not the equity of the bill; which is grounded on the abstract question of right: and, that breaking down, the plaintiffs seek to support their case by relying on the statements in the answer. Let them amend their bill, and put that matter in issue, or show that by default of legal remedy they have an equity. I say nothing as to such a case: but there is great difficulty in supporting the bill on the ground that, because there is a devise of the legal estate in trust, there is a right to file a bill against the *cestui que trust*, and thus pass over the legal hand who was liable to make the payment. Here the plaintiffs have a right to distrain; they have therefore a legal remedy; and it does not follow that, because that remedy at law is full of difficulties, the party has a remedy in equity. I do not dispose of the point, but I refuse to make this order upon motion.

Refuse the motion; and let the costs be costs in the cause.

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THE EARL OF LUCAN *v.* O'MALLEY.

MR. SIDNEY JACKSON was, in the year 1842, appointed commission-examiner in chief in this cause; and in October in that year examined several witnesses on behalf of the defendant, some of whom were cross-examined by the plaintiff. The cross-examination lasted about thirty-one hours. The plaintiff did not produce any witnesses to the commissioner for examination.

In 1844, the cause being then in the Master's office to take the accounts directed by the decree, the defendant applied for a commission in aid. This was opposed by the plaintiff. The Master ultimately decided that a commission should issue. The defendant's solicitor then served notice of the name of *R. C.* as a commission-examiner in aid; but the plaintiff's solicitor having referred the Master to the General Rule of the Court, directing the appointment of persons resident near where the commission was to be sped, and having stated that *Mr. Jackson* had already been appointed examiner in chief, and that he resided near where the commission was to be sped, the Master stated that he would nominate him as commission-examiner in aid. The plaintiff's solicitor at the same time stated to the Master that the plaintiff would not join in the commission, or produce any witnesses on his behalf before the commissioner, but would produce his witnesses before the examiner in Dublin, as he had heretofore done, as he did not intend to join in any manner in the expense of the commission.

November 4, 6.

Where a commission to examine witnesses issues at the instance of one of the parties to the suit, the other not concurring in it, the party issuing it must pay all the expenses of the commissioner, even though the other party should cross-examine the witnesses of the person issuing the commission: but if the opposite party examines under the commission on the direct, he must pay the commissioner for the examination and cross-examination of his own witnesses.

The commission was, in October, 1844, sped at Castle-

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bar, in the county of Mayo; the plaintiff did not produce any witnesses to the commissioner, or cross-examine the witnesses of the defendant.

The commission was afterwards renewed in December, 1844; and the commissioner was occupied from the 23rd to the 31st of December in cross-examining the defendant's witnesses. No witnesses were, on this occasion, examined on the direct.

The commission was again, in February, 1845, renewed; and the commissioner was occupied from the 11th of February to the 4th of March, in examining and cross-examining the defendant's witnesses: the time occupied in cross-examination, on that occasion, was sixty-one hours.

The plaintiff did not examine any witnesses upon the direct, either in chief or in aid, under the commissions; he produced all his witnesses for examination to the examiner in Dublin.

The fees due to the commissioner, after giving credit for the sum of 100*l.* paid to Mr. *Jackson* by the defendant, amounted to the sum of 283*l.* 13*s.*; and Mr. *Jackson* being unable to procure payment of that sum, obtained on the 27th of June, 1845, an order at the Rolls, that the plaintiff, the Earl of *Lucan*, and the defendant, *St. Clair O'Malley*, or one of them, do within ten days after service on them of the order, pay to Mr. *Jackson* the sum of 283*l.* 13*s.*, being the sum remaining due to him as such examiner; with his costs of the motion, when taxed and ascertained.

The Earl of *Lucan* now moved, by way of appeal, that

the order of the 27th of June, 1845, might be varied or set aside, so far as same directed the plaintiff to pay the above sum and costs to Mr. *Jackson*.

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The defendant was in embarrassed circumstances, and out of the jurisdiction.

Mr. *Brooke*, Mr. *Monahan* and Mr. *S. Miller* for the Earl of *Lucan*.

Argument.

Antecedently to the 4 Geo. IV. c. 61, the practice was for each party to serve the names of four commissioners; the Six Clerks then met, and each struck out two names; and the commission was directed to the four persons remaining. Each party was held to be liable to his own commissioners only; and if either party did not choose to join in the expense of the commission, the other might name four commissioners, for whose expenses he alone was answerable; but, nevertheless, the opposite party, though he did not join in the commission, was entitled under it to cross-examine the witnesses produced by the party suing out the commission. The commissioner was so far the appointee of the party naming him, that he might maintain an action at law against him for his fees: *Stockhold v. Collington*(a); *Blundell v. Gladstone*(b). This practice was altered by the 4 Geo. IV. c. 61, the forty-third section of which directed that the Master should appoint one person to act as examiner, who should be taken as, and considered to be, an officer of the Court; and by the forty-fourth section, the commissioner was empowered to cross-examine any witness produced before him: and it was enacted that it should be

(a) 1 Salk. 330.

(b) 9 Sim. 455.

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lawful for every commissioner so to be appointed, to receive such fees and allowances for the execution of his duty in the examination of witnesses, and for the expenses of such commissioner in travelling, and that they should be subject to such other rules and regulations, as should be for that purpose from time to time authorized and made by order of the Court of Chancery. But no order has, in fact, ever been made by the Court on the subject of the fees. The 104th, 105th, and 108th General Orders of 1834, relating to the appointment of commission-examiners, and which are consolidated by the 85th General Order of 1843, are silent as to the person by whom their costs and expenses are to be paid. In *Millner v. Joseph(a)*, and *Stafford v. Stafford(b)* the defendant, although he merely cross-examined the plaintiff's witnesses under the commission, was ordered to pay one-half of the expenses; but in those cases the commission issued and the examiner was appointed by the consent of both parties. But in *Millner v. Joseph* the Master of the Rolls says, that where the commission issues at the instance and on the sole responsibility of one party, it is reasonable that the party issuing the commission should be alone liable to the commissioner, unless the other party makes it in some degree his own by proceeding under it to prove his own case by direct examination: and such is the practice both of this Court and of the English Court of Chancery: *O'Hara v. O'Hara(c)*; *Jackson v. Strong(d)*. The case of *Rogers v. Aylmer(e)* is not an authority upon this question; it only shows what the practice of the Court of Exchequer is.

(a) 5 Ir. Eq. R. 214.

(b) 5 Ir. Eq. R. 215, n.

(c) 1 Hog. 234.

(d) 13 Pri. 309; 2 Dan. Ch. Pr. 540.

(e) 5 Ir. Eq. R. 586.

Mr. Moore and Mr. Atkinson, for the commission-examiner.

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In this case both parties concurred in the appointment of the commissioner, and, therefore, both parties are liable. THE LORD CHANCELLOR, after hearing this question of fact discussed, was clearly of opinion that the plaintiff, by objecting to the appointment of the person named as commissioner by the defendant, did not waive his objection to joining in the commission; and that in fact the commission in the present case issued *ex parte* at the instance of the defendant.] The authorities cited do not establish the non-liability of the plaintiff. In *O'Hara v. O'Hara* the commission issued *at the expense* of the party issuing it; and in *Jackson v. Strong* the bill was for a discovery and a commission to examine witnesses; and, therefore, the plaintiff, from the nature of the case, was bound to pay the whole expense of the examination. In *Millner v. Joseph* the Master of the Rolls considered that those authorities were not sufficient to establish the general proposition for which they have been cited. But *Rogers v. Aylmer* in principle is an authority for the liability of the plaintiff in his case; it shows that if the opposite party makes any use of the commission, though only by cross-examining under it, he must contribute to the costs and expenses of the commissioner: whether in proportion to the time occupied by him, as was held in *Rogers v. Aylmer*, or whether the liability of the parties to the commissioner is joint and several or the whole of the expenses, is a different question.

Mr. Monahan in reply.

The order of the Master of the Rolls, in this case, goes beyond any of the authorities; it was not pretended in

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Millner v. Joseph, Stafford v. Stafford, or Rogers v. Aymer, that the parties were jointly liable for the whole expenses of the commission : a several liability was all that was contended for.

Judgment. THE LORD CHANCELLOR:—

The Master of the Rolls has so great knowledge of the practice of this Court, that I am unwilling, without further inquiry, to disturb what he has decided. Since the 4 Geo. IV. was passed there must have been some current of practice upon this subject ; I shall, therefore, ask the Masters to certify to me what is the practice of the Court in this respect. It is much to be regretted that there should be a different rule upon the subject here and in the Exchequer : but if I find there is an established practice here, I shall abide by it, though I think much may be said in favour of the rule in the Exchequer.

Statement. The following is a copy of the question sent to the Masters, and of their reply :—

“ THE LORD CHANCELLOR wishes the Masters to certify to him, what, in their opinion, is the practice in cases where a commission-examiner in the country is nominated by the Master at the instance of one of the parties in the cause, and the other party, not concurring in the necessity of the commission, yet cross-examines the witnesses ;—who is bound, according to the present practice of the Court, to pay the expenses of the commission-examiner ?

“ The Masters, if they shall think fit in considering the question, to call to their aid the two chief examiners of the Court.

“ ROBERT LONG,
“ *Registrar.*”

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“ The Masters having conferred upon the subject of the above *quære*, transmitted to them by the LORD CHANCELLOR on the 5th instant, and having being assisted by the chief examiners, respectfully certify, that, according to the present practice of the Court, the person who issues the commission is bound to pay the expense of the commission-examiner, unless the opposite party has examined on the direct, in which case he is bound to pay the commissioner for the examination and cross-examination of his own witnesses.

“ Dated 6th day of November, 1845.

“ WILLIAM HENN.
J. S. TOWNSEND.
THOMAS GOOLD.
EDWARD LITTON.

“ *The Right Hon. the Lord Chancellor.*”

THE LORD CHANCELLOR :—

I feel myself bound to act on the certificate of the Masters; the consequence of which is that the order of the Master of the Rolls cannot be maintained, for that order is that Lord *Lucan* and Mr. *O'Malley*, or one of them, do pay. If the Masters had expressed a doubt upon the matter, I would have looked into the authorities; but their certificate is precise and conclusive as to the practice; and the

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1845. rule certified by them is a sensible and reasonable one.
 Nothing could be more absurd than that the mere cross-examination of a single witness should subject the party to a liability for all the expenses of the commission. Rather than adopt such a rule, I would adopt the practice in the Exchequer.

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I must, therefore, vary the order of the Master of the Rolls, by striking out of it the name of the Earl of *Lucan*.

DONOHOE v. CONRAHY.

November 7.
 Circumstances under which a parol trust of real estate will be enforced.

Conversations containing admissions which go to the gist of the case, ought to be put in issue by the bill.

BY indenture of lease dated the 3rd of December, 1799, *Hampden Evans* and *George Evans*, his son, demised to *James Conrahy* and his heirs, all that part of the lands of *Kilbride*, in the Queen's County, therein described as held and occupied by *James Conrahy*, the lessee, the widow *Donohoe* and the representatives of *Patrick Donohoe*, deceased, to hold for the term of three lives, at the yearly rent of 10s. per acre for 111 acres thereof, and 12s. per acre for 9A. 2R. 36P. thereof; which amounted in the whole to 61*l.* 3*s.* 6*d.* per annum.

Long before the execution of this lease the lands had been occupied by the father of *James Conrahy*, by the husband of the widow *Donohoe*, and by *Patrick Donohoe*, as tenants to *Hampden Evans*, and at the time of the execution of the lease of 1799 they were in the possession of *James Conrahy*, the widow *Donohoe*, and *John* and *Peter*

Donohoe, the sons of *Patrick Donohoe*. These several persons were connected with one another by ties of relationship, and they occupied the lands partly in common, by grazing them with cattle, and partly in severalty; the portions to which each of them was entitled in severalty not lying together in one farm, but consisting of detached pieces of land, lying intermixed with the holdings of the others of them. *James Conrahy* occupied one-half of the lands, the widow *Donohoe* one-fourth, and *John* and *Peter Donohoe* the remaining one-fourth. It did not appear whether the tenants derived under a common title from *Mr. Evans*; but it was in evidence that for many years before and after 1799 *Mr. Evans* received the widow *Donohoe's* rent directly from herself, and gave receipts for it as for rent due by her out of her holding at Kilbride.

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The husband of the widow *Donohoe* had, in his lifetime, applied to *Mr. Evans* for a lease of that portion of the lands then in his occupation; but *Mr. Evans* refused to grant it, on the ground that he had an objection against setting the lands in small portions.

The bill charged that *Mr. Evans*, not wishing to receive the rent of the lands from so many persons, and having previously promised the occupying tenants to grant them a lease for three lives of the lands, it was mutually agreed upon that a lease should be made directly to *James Conrahy* for his own benefit, and for the use of the widow *Donohoe*, and the representatives of *Patrick Donohoe*, as to those parts of the lands then occupied and held by them respectively: and that the lease of 1799 was taken upon the trust that *James Conrahy* should execute leases of a moiety of the lands to the then occupying tenants thereof, at the

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yearly acreable rent reserved by the lease ; *James Conrahy* reserving to himself a moiety of the lands.

After the execution of the lease of 1799, the widow *Donohoe* continued in possession of that part of the lands of which she had previously been in the occupation and enjoyment, and paid to *James Conrahy* the same rent therefor which she had before paid to Mr. *Evans*.

About a year after the execution of the lease of 1799, a survey and division of the lands was had between *James Conrahy*, the widow *Donohoe*, and *John* and *Peter Donohoe*. The object of it was, that each of the parties should have his or her holding in one connected farm, separate and apart from the others, and not in detached portions as theretofore ; and the lands were to be divided amongst them in proportion to the portions theretofore held by them. Before this survey and division was made, the pasture on the lands was used in common, each occupier placing stock thereon according to his interest therein. Shortly after the division was made *James Conrahy* complained that he had not been given his full portion of the lands ; whereupon a part of the widow *Donohoe's* holding was given to him. Since that time the lands were held according to the division then made.

By indenture of lease bearing date the 10th of December, 1801, *James Conrahy* demised to *John* and *Peter Donohoe* that part of the lands of Kilbride then held and occupied by them, for the term of the three lives named in the lease of 1779, at the yearly rent of 15*l.* 6*s.* ; and *John* and *Peter Donohoe* thereby covenanted with *James Conrahy*, that if either of them should have occasion to

set, sell or mortgage their parts of the land demised, they would give *James Conrahy* the first preference of the same. The land demised and the rent reserved by this lease, was one-fourth of the land demised and the rent reserved of the lease of 1799.

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James Conrahy died in the year 1820, having in his lifetime demised portions of his part of the lands of Kilbride to his eldest son *John*, and to other persons. By his will he disposed of the several "profit rents" which he was entitled to receive out of the lands; but did not make any mention therein of that part of the lands which he had demised to *John* and *Peter Donohoe*, or that part of them formerly in the possession of the widow *Donohoe*.

The widow *Donohoe* had three sons, *Patrick*, *James*, and *Thomas*; the youngest of whom, *Thomas*, was the father of *Joseph* and *Thomas Donohoe*, the plaintiffs in this suit. About the year 1806, the widow *Donohoe* divided the lands amongst her sons, and *Thomas* got possession of about eleven acres of them from her, subject to its due proportion of the rent paid by her to *James Conrahy*; which rent *Thomas* regularly paid to *James Conrahy* during his life, and afterwards to his sons, *John* and *Thomas Conrahy*. He died in 1837, having, as the plaintiffs alleged, but did not prove, assigned his eleven acres to his two sons, the plaintiffs. Upon his decease, the plaintiffs entered into possession, and paid their rent to *John Conrahy*. In 1843, *John* and *Thomas Conrahy* commenced proceedings by civil bill ejectment, to turn the plaintiffs out of possession, treating them as tenants from year to year.

The present bill was filed against *John* and *Thomas*

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Conrahy and the sons and heirs of *Patrick* and *James Donohoe*, the two other sons of the widow *Donohoe*. It stated, that before the execution of the lease of 1799, the head rent of the lands was occasionally given by the occupying tenants to *James Conrahy*, for the purpose of handing over same to the landlord; and prayed that the trusts of the deed of 1799 might be carried into effect, so far as related to that part of the lands of Kilbride described therein as held by the widow *Donohoe*; and that it might be declared that *James Conrahy* was but a trustee thereof for the widow *Donohoe*, her heirs and assigns: and for an injunction against proceedings at law.

The plaintiffs tendered evidence of a conversation in which *James Conrahy* said to one of the sons of the widow *Donohoe*, that it was equally as good or beneficial for the other occupiers on the lands, as it was for himself, that he had obtained the lease of 1799; and of another conversation in which, upon one of the sons of the widow *Donohoe* expressing a desire to have a lease executed to him of his holding, *James Conrahy* stated that he need not have any doubts on the subject, as he would execute such lease whenever it was prepared. These conversations were not put in issue by the bill, and were stated to have occurred more than twenty-five years before. They were read *de bene esse*. Upon behalf of the defendants, evidence was given that *James Conrahy* had refused to give a lease to *Thomas Donohoe*, the father of the plaintiffs, of that portion of the land occupied by him, though he offered to give as high a rent for it as any other person. No claim of title to the lands was at that time put forward by *Thomas Donohoe*.

The plaintiffs charged that the execution of the lease of

1801, was in pursuance and execution of the trust upon which the lease of 1799 was held by *James Conrahy*; but the defendants showed that the lessees therein, had given a valuable consideration for it, namely, the surrender to *James Conrahy* of part of the lands of Kilbride then in their possession. The plaintiff also relied on the fact that the defendants had charged them with the tithe rent-charge, as evidence that they were not considered by them as tenants from year to year.

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It did not appear that, although the lands in the occupation of the widow *Donohoe* were of greater value than the rent paid for them by her, *James Conrahy* had ever made any claim to a beneficial interest in them; and it was admitted that he never received any profit out of them.

The defendants denied the existence of any trust, and said that it was by reason of the relationship existing between the parties, that the widow *Donohoe* was permitted to occupy the lands at the same rent as that paid by *James Conrahy*; and that the said rent was paid by her to *James Conrahy* as landlord, and not as trustee.

Mr. *Moore*, Mr. *James Plunket* and Mr. *Mara*, for the plaintiffs, submitted that the case was taken out of the operation of the Statute of Frauds, first by part performance, and secondly by the fraudulent conduct of *James Conrahy*: *Dolin v. Coltman*(a); *Stickland v. Aldridge*(b).

Argument.

Mr. *Monahan*, Mr. *Martley* and Mr. *Gibbon*, for the defendants.

(a) 1 Ver. 194.

(b) 9 Ves. 516, 519.

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THE LORD CHANCELLOR:—

I concur in the regrets expressed by the counsel for both parties, that such a trifling matter should be made the subject of a bill in Equity. It is a case, however, which involves an important question of law; although upon the facts there is no great difficulty. The parties in possession were not so precisely in the way stated in the bill. They occupied the lands amongst themselves in a very undesirable manner, holding parts in severalty, and the remainder in common. The consequence was, that the landlord, Mr. *Evans*, refused to grant to the occupying tenants leases of the small portions of land which they held; but agreed to grant a lease of the whole to one person, who had been in possession of an undivided portion of the land. The lease so granted does not contain any reference to a trust or obligation, upon the part of the lessee, to make subdemises to the occupiers; nor is there anything in the lease to lead to such an inference. The lessee, on the contrary, enters into the usual obligations of a lessee, and is bound personally to perform them, whatever may be his liability to the persons claiming under him. It is said that the property is described in the lease as being in the possession of several persons, which is alleged to be an unusual mode of describing property in this country. I do not know how that is, but there is certainly nothing improper in so describing the property, in order to identify the lands intended to be conveyed. The present claim is made by persons deriving under one of the former tenants, to have a lease granted to them of a portion of the lands, pursuant to an alleged trust or agreement subsisting between the actual tenant under the lease, and the several persons who previously held the land as tenants. Now what are the steps to prove such a trust or agreement?

There is no attempt made to prove that any of these parties desisted from bidding for the property, in order to enable *James Conrahy* to obtain a lease of the whole for the benefit of all, which is generally the first step in a case of this nature. If such an agreement had been proved, *Lamas Bayly(a)* and *Atkins v. Rowe(b)*, are authorities of considerable weight against its validity and binding effect, having regard to the Statute of Frauds. I do not know that it should have given effect to such an agreement if it had been proved; but it is sufficient to say that no such case is made, which is a circumstance of weight. The next ground is a promise amounting to what would bind the conscience of the party in this Court; or an agreement or declaration amounting to a contract or trust. No promise is either alleged or proved in this case; for the evidence amounts only to a statement of what may amount to an admission of an intention, on the part of the lessee, that these persons should have the same benefit of the lease to him, which they had before. The cases referred to are cases where there had been an actual promise, which, being made, and not carried into execution, was a fraud upon a third party, and operated as a deceit on the person to whom the promise was made. *Thynn v. Thynn(c)* was of this nature. There was in that case a direct promise made by the executor to the testator, that he would be executor in trust for his mother. So in *Stickland v. Aldridge(d)* there was a promise by the devisee to execute the trust: but here nothing of the sort is attempted to be proved, and therefore the right of the plaintiffs cannot stand upon that ground. The only other ground is that of contract or trust. Contract there is none

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(a) 2 Vern. 627.

(c) 1 Vern. 296.

(b) Mos. 39; 3 Ven. & Pur. 253, (d) 9 Ves. 516.

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in this case ; then is there any trust ? The only way in which the operation of the Statute of Frauds is attempted to be avoided, which requires expressly that every trust of lands shall be evidenced or proved in writing,—not that it shall be created by writing, but that it shall be so evidenced at the time it is sought to be enforced,—is, by alleging that, from the *res gestæ* of the transaction, the Court must come to the conclusion that this lease was taken in trust for them. Supposing that to be so, the question would remain, whether a moral conviction amounts to a legal conclusion, such as I am to act upon. But what are the facts to justify the assertion that a trust has been created ? The leading ones are, possession by the different parties consistent with their previous occupation. I think the evidence of the plaintiffs on this point has rather damaged their case ; for it shows that the possession after the lease did not correspond with the possession before its execution. It, therefore, was not a continuance of the original possession, but rather a new letting. Then it was said, that the lease which was granted to one of the occupiers showed that the lessor considered himself bound to grant it upon terms something like those of the previous holding. In answer to that, it is proved by the defendant that a consideration was given for that lease in the nature of a fine ; viz., a portion of the land previously held by the tenant was given up to the original lessee, which circumstance rebuts the case attempted to be made as to the sublease. There is also, on the face of the sublease itself, a clause which puts an end to this question ; for there is a right of pre-emption given to the lessor in case the lessee should desire to sell the property. That is a stipulation wholly inconsistent with the terms of the supposed trust. I therefore must consider that lease to have proceeded either from bounty or contract, and not

from the mere execution of a trust. Then it was urged, there is possession in the plaintiffs and damage done to them by payment of the tithe rent-charge. This has been answered by the Act of Parliament; for although the occupying tenant was not liable to the clergyman for the tithe rent-charge, yet he was so to the landlord. Then it is said that the lands were of greater value than the rent at which the plaintiffs were permitted to hold them, and from that an inference in their favour is sought to be drawn; but I cannot enter into that question: and, if it were to be considered, it is met by the circumstance that the parties were near relations, and *Conrahy* might have allowed the widow *Donohoe* to hold under him at the same rent as he himself paid. The lease granted by *Conrahy* to the other occupying tenants does not refer to any preceding obligation upon him to execute it; and that is a circumstance of considerable force to show that it was not executed in pursuance of a previous contract or trust. Then the will of *Conrahy*, the lessee, is referred to; and it is said that he thereby disposed only of that portion of the lands which he had retained. A man is not obliged to devise all his land, but may allow a portion to go to his heir at law; that is an answer, in law, to the objection: but the answer in fact is, that the will does not purport to dispose of the lands themselves, but only of the profit rent he had in them; and out of this part of them he did not derive any profit rent. In this case there has been no expenditure. The mere continuance in possession by a tenant from year to year, who has contracted by parol for a lease, will not confer a title which can be enforced in this Court. In order to enable the Court to interfere as against the Statute of Frauds, there must be some damage which the tenant would sustain, if the contract be not carried into execution. Here, all the grounds on which the plaintiffs have rested their

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case fail; and, if I look to the parol evidence on their part, I find it to be most unsatisfactory. It is evidence of a conversation which occurred many years back, with a man since deceased, containing admissions of the existence of a trust; and that conversation has not been put in issue by the bill, though this is precisely the case in which the rule ought to have been followed. I think, therefore, that this case fails upon every ground.

A question was raised by the defendants, whether the plaintiffs, supposing the case to be made out, have a right to maintain this bill. When a party comes to a hearing, he must be prepared to shew that he has the right to sue, which by his bill he asserts he has. I see no such right here: for if there were a contract or trust, yet, this being an equitable freehold estate, the plaintiffs have not proved any title to it by devolution, transfer, or conveyance. Upon this record they stand as mere strangers to the property. And if the title alleged had been proved, there still would have been a misjoinder of plaintiffs: for one of them would have been entitled to sue, and the other not. I have, however, some impression that my decree is not according to the real intention of the parties, which makes me desirous, if possible, to spare the plaintiffs the costs of this suit; but I find I cannot do so; and therefore must dismiss this bill with costs.

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BERMINGHAM *v.* BURKE.BERMINGHAM *v.* WARD.November 8,
11, 17.

NICHOLAS BERMINGHAM, the elder, being seised in fee (amongst other lands and premises) of the lands of Garranacoile, by indenture of lease dated the 1st of January, 1783, demised fifty-nine acres thereof to *Richard Fahy*, *Patrick Fahy*, and *William Lane*, their executors, administrators and assigns, to hold from the 1st of May then last past, for the term of thirty-one years, at the yearly rent of seventeen shillings an acre; and *Nicholas Bermingham*, the elder, for himself, his heirs and assigns, covenanted with the lessees, their executors, &c., that they, their executors, &c., paying the reserved yearly rent and performing the covenants, should and might, peaceably and quietly, have, hold and enjoy the demised premises, with the appurtenances, during the term thereby demised, without any let, hindrance, interruption or disturbance, of *Nicholas Bermingham*, the elder, his heirs, executors, administrators or assigns, or any other person claiming or deriving from, by, or under him, them or any of them.

The lessees entered; and *Richard Fahy* and *William Lane* having died, the entire interest under the lease vested in *Patrick Fahy* by survivorship; but he permitted the sons

Damages occasioned by the breach of a covenant for quiet enjoyment after the death of the covenantor, are a debt of his within the meaning of a devise in his will of his lands to trustees, upon trust, by sale or mortgage, to pay off and discharge all such just debts of every kind as he should happen to owe at his decease.

In 1804 *F.* instituted a suit in Equity to recover damages for breach of covenant out of the real and personal estate of *B.*, the covenantor; and obtained a decree in 1820, directing a reference, or an issue, to ascertain the amount of the damages: but, instead of pro-

secuting the decree, *F.* brought an action on the covenant, and in 1822 obtained judgment therein. Shortly afterwards *F.* died. In 1841 administration of his effects was obtained; and in the same year his personal representative filed a bill of revivor; but, without obtaining an order to revive, he, in the same year, filed a charge on foot of his demand, under an order of reference of 1841 made in another cause, instituted in 1796, to carry the trusts of the will of *B.* into execution; in which cause a sum of money had been impounded to meet, amongst others, the claim of *F.*: the reference being to ascertain what were the charges affecting that fund:—*Held*, that the case was not within the 3 & 4 Will. IV. c. 27, and that the demand of *B.* was not barred.

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of *Richard Fahy* and *William Lane* respectively to occupy the portions of the land formerly occupied by their fathers, upon their paying their just proportions of the head rent.

By his will, dated the 25th of October, 1793, *Nicholas Bermingham*, the elder, devised all his real and freehold estates, and, among others, the lands of *Garranacoile*, to trustees and their heirs, upon trust, in the first place, out of the rents and profits of said lands, or by sale or mortgage of them or of sufficient part thereof, to pay off and discharge all such just debts, of every kind, as he should happen to owe at his decease: and upon the further trust, to levy and raise, in manner aforesaid, a sum of 4000*l.*; and to apply and hand over the same in manner thereafter mentioned. The testator then directed his trustees to pay 200*l.*, part of the 4000*l.*, to his wife, *Elizabeth*; and to pay various other sums thereout to different legatees named in his will; and as to 290*l.*, being the residue thereof, to pay same to his executors, to be by them applied to the payment, as far as the same would reach, of any notes, bills, or shop accounts, due by him. And as to his demesne and mansion-house of *Barbersfort*, he declared that he devised the same upon trust to permit his wife *Elizabeth* to hold same during her life, at a certain annual rent. And as to the residue of his lands, he directed that his trustees should hold the same, subject to the payment of his debts and legacies aforesaid, to the use of *John Bermingham* for life, and after his decease, to the use of *Nicholas Bermingham* the younger (the son of *John*), his heirs and assigns, for ever. And as to all his personal estate, save his stock of cattle, household furniture and plate (which he had previously given to his wife), he bequeathed same to his executors, to be by them applied, as far as the same would reach, in exoneration of his real

estates; in the first place, towards payment of his debts, and then towards the discharge of the legacies bequeathed by his will.

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Nicholas Bermingham, the elder, died on the 26th of November, 1793. His widow, *Elizabeth*, afterwards intermarried with *Richard Burke*; and she and her husband, in Hilary Term, 1799, sued out a writ of dower, upon which, in Michaelmas Term, 1794, they recovered judgment; and in 1797 were put into possession of one-third part of the fee simple lands of *Nicholas Bermingham*, the elder; and, amongst them, of the lands demised by the lease of the 1st of January, 1783. Upon the *habere* being executed, *Patrick Fahy* entered into an agreement with Mr. and Mrs. *Burke* for a lease of the lands demised by the lease of 1783, at an increased rent.

The trustees and executors named in the will of *Nicholas Bermingham*, the elder, having refused to act, administration with the will annexed was granted to *Nicholas Bermingham*, the younger; and on the 12th of May, 1796, *John Bermingham* and *Nicholas Bermingham*, the younger, filed the bill in the first cause for the purpose of having the trusts of the will carried into execution: and by a decree made in that cause on the 9th of December, 1799, it was ordered that the trusts of the will should be carried into execution; and it was referred to the Master to take an account of the real and personal estate of *Nicholas Bermingham*, the elder, and of his debts, legacies and funeral expenses, and to approve of proper persons to be appointed trustees in the room of the trustees appointed by his will.

The Master made his report on the 22nd of July, 1803,

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and thereby reported that, upon the death of the testator, his house and demesne of Barbersfort came into the hands of *Elizabeth*, his widow, by virtue of the devise thereof to her; and that the residue of the lands had gone into the hands of certain *elegit* creditors therein named. And he further reported that upon the 23rd of January, 1797, one-third part of the lands came into the hands of said *Elizabeth*, then the wife of *Richard Burke*, by virtue of a writ of dower; and that said *Richard* and *Elizabeth* then remained in the possession thereof, and of the rents, issues and profits thereof; and that the remaining two-thirds of the lands came into the hands of *Nicholas Bermingham*, the younger, on or about the 13th of December, 1799^(a). And he further reported that the testator, at the time of his death, was indebted to divers persons by judgment; and that there was then due on foot of said judgments the sum of 2982*l.*: and that there was due on foot of the legacies bequeathed by his will, the sum of 4595*l.* c

In June, 1805, the cause was heard upon the report, and exceptions thereto, which were allowed; and it was decreed that the disposition made in favour of Mrs. *Burke*, in respect of the house and demesne of Barbersfort, was inconsistent with her demand of dower thereout; and that, therefore, she must elect to waive^(b) her dower out of said house and demesne, and^(b) accept such disposition in satisfaction thereof; but that the dispositions in her favour contained in the will could not affect her claim to dower out of the residue of the testator's estate. And it was further declared that the judgment in the writ of dower obtained against the

(a) *John Bermingham* had died cree.
 before the pronouncing of this de- (b) Sic in Registrar's Book.

testator's heirs, could not affect the title of the devisees in his will. And the defendant, Mrs. *Burke*, electing to take under the disposition of the house and demesne of Barbersport in her favour, and to waive all demand of dower thereout, it was ordered that it be referred to the Master to inquire and report whether Mrs. *Burke* was entitled to dower of any other, and what estate of the testator; and also to take an account of what became due to her in respect of such dower; and also to inquire whether she was at any time, and when, put into the actual possession of any and what part of the said estates as for dower, and in what manner. Special inquiries were then directed as to the persons by whom the rents of the lands had been received since the death of the testator, and the sums received by them. And the Master was directed to report particularly whether any debts, besides those in the report, remained unsatisfied, and whether any demand had been incurred against the trust estate, in consequence of the demand of dower made by Mrs. *Burke*, to defeat leases executed by the testator: and to inquire whether any leases were executed by the testator, of any part of the estate, which had been avoided by Mrs. *Burke's* claim of dower. And the Master was directed to state whether any and what demand had been occasioned thereby against the testator's estate, to be raised by sale or mortgage under the trusts of his will; and it was declared that Mrs. *Burke* could not claim the benefit of the legacy given to her by the testator's will, without confirming such leases, or making good such demand against the testator's estate(a).

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On the 6th of July, 1810, the Master made his report

(a) See *Birmingham v. Kirwan*, 2 Sch. & Lef. 444.

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pursuant to that decretal order ; and thereby found that a demand had been incurred against the trust estate, in consequence of the demand of dower made by Mrs. *Burke*, to defeat leases made by the testator ; that the lease of the 1st of January, 1783, amongst others, had been avoided by Mrs. *Burke's* claim of dower ; and that a demand had been occasioned thereby against the trust estate on foot of the said leases, to the amount of the difference between the rents reserved by them, and the rents reserved upon the new lettings made by Mr. and Mrs. *Burke*. He further found that the tenants of those leases, and amongst them *Patrick Fahy*, retained to that amount out of the rent payable by them respectively in respect of the other two-thirds of the lands, in right of the covenants for quiet enjoyment contained in their leases ; and that said demand might be raised by sale or mortgage under the trust in the will of the testator.

This report, so far as it related to *Patrick Fahy* having retained the difference of the rents out of the two-thirds payable to the devisees of *Nicholas Bermingham*, the elder, was not warranted by the fact.

In November, 1810, and February, 1811, the cause was heard upon the report ; it stood over for some time to give Mr. and Mrs. *Burke* an opportunity of presenting a petition to have the decree of 1805 reheard ; but no petition having been presented, it was declared, that Mr. and Mrs. *Burke*, not having made any new election, were to be deemed to have abided by their former election ; and it was ordered that the lands should be sold, and that out of the produce of the sale, the reported incumbrances, debts and legacies, and, amongst them, the demand occasioned by the avoiding

of the leases, should be paid in the manner therein mentioned.

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In April, 1812, the cause was reheard upon the petition of Mr. and Mrs. *Burke*, praying that they might have an opportunity of making Mrs. *Burke's* final election, by relinquishing all her rights under the will and devise therein of the house and demesne, and abiding by her full thirds of dower out of the estate of the testator; and it was thereupon decreed that the decretal order of the 25th of June, 1805, was to be considered as declaring that Mrs. *Burke* could not claim the benefit of the devise of the house and demesne, or of any other devise or bequest, any more than of the legacy given to her by the will of the testator, without making good the loss sustained by her having avoided leases made by the testator: and Mrs. *Burke* having obtained permission to elect whether she would claim under the testator's will or abide by her full rights as doweress and relinquish all claims under the will [and having elected to abide by her full rights as doweress, and to relinquish all claims under the will(a)], it was ordered that the testator's will should be carried into execution; and accordingly that the lands should be sold for payment of the debts and legacies, &c., &c.

In June, 1816, the lands were sold to *Robert Rutledge*, Esq., for the sum of 14,150*l.*; and, upon a reference as to title, the Master reported that a good title could be made, subject to the several unsatisfied judgments mentioned in the schedule to his report, and subject also, to such sum of

(a) These words are not in the but seem to have been accidentally decreed, as entered in *Reg. Lib.*; omitted by the clerk.

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money as might be decreed in a certain cause then depending in this Court, wherein *Patrick Fahy* was plaintiff, and *Nicholas Bermingham*, the younger, was defendant : and he further reported that the purchaser had consented to waive the objection from the pendency of said suit, upon a sufficient sum being lodged to the credit of the cause, to answer such sum as might be eventually decreed ; and he reported that the residue of the purchase-money which would remain after paying the several persons who had proved their demands under the decree, ought to be invested in Government security for the protection of the purchaser, until the judgment debts, which were stated in the schedule to his report, were satisfied, and the said suit was determined.

The reported creditors were accordingly paid off out of the purchase-money ; and, by order of the 30th of July, 1816, the residue, 3582*l.* 16*s.* 3*d.*, was invested in the purchase of Government stock, and transferred to the credit of the cause, for the purposes in the report mentioned. A part of this fund was afterwards paid out to judgment creditors mentioned in the schedule to the report, but there still remained in Court a sum of about 3,900*l.* stock, to the credit of the cause.

The circumstances as to *Fahy's* suit were these : On the 28th of May, 1804, *Patrick Fahy* filed his bill in this Court against *Nicholas Bermingham*, the younger, and the heir at law of the surviving trustee in the will of *Nicholas Bermingham* the elder, for compensation in damages for the loss sustained by him, by reason of the eviction of his interest as tenant under the lease of 1783 ; and, by his bill, prayed for a reference to inquire what loss or damage he had sustained by such eviction, or otherwise, that an issue might be directed

to ascertain its amount; and for an account of the real and reehold estates of which *Nicholas Bermingham*, the elder, died seised; and that the sum which *Patrick Fahy* should, upon such inquiry, appear to be entitled to, as compensation for such loss, might be deemed a good and sufficient charge upon said real estates, and that same should be paid to him in such manner as the Court should direct.

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A conditional decree upon sequestration against *Nicholas Bermingham*, the younger, having been pronounced in May, 1817, an absolute decree was, on the 9th of December, 1820, made in that suit, in the terms of the prayer of the bill.

Instead of taking a reference or an issue, according to the terms of the decree, *Patrick Fahy*, in order to ascertain the amount of the damages sustained by him, brought an action at law on the covenant for quiet enjoyment in the case of 1783, against *Nicholas Bermingham*, the younger, the personal representative and devisee of the covenantor; and, having obtained judgment therein by default, he sped a writ of inquiry, upon which the damages were assessed to the sum of 480*l.* 9*s.* 3*d.*; for which sum, together with costs, amounting in the whole to 505*l.* 13*s.* 6*d.*, judgment was entered in Hilary Term, 1822.

Patrick Fahy died intestate, on the 10th of March, 1822. *Luke Fahy*, his son, obtained administration of his effects in 1841, and afterwards filed a bill of revivor in the cause of *Fahy v. Bermingham*; but, in consequence of the proceedings had under the order of reference hereafter mentioned, dated the 10th of February, 1841, and made in

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the cause of *Bermingham v. Burke*, and of the advertisements for creditors published in pursuance thereof, he discontinued any further proceedings on foot of the bill of revivor; and, not having obtained an order to revive, came in and filed a charge under the order of reference in *Bermingham v. Burke*.

The order of the 10th of February, 1841, in the cause of *Bermingham v. Burke*, was obtained upon the application of *Edward Thomas Beytagh*, a third person; and thereby it was referred to the Master to inquire and report whether *Edward Thomas Beytagh* had any claim or demand affecting the funds to the credit of the cause of *Bermingham v. Burke*, and whether such funds, or any part of them, could be applied in discharge of said demands, without prejudice to the rights of *Robert Rutledge*, the purchaser, or the children of *Nicholas Bermingham*, the plaintiff; and to cause advertisements to be published, calling on all persons having claims affecting the residue of the funds produced by the sale of the lands, to come in and prove the same.

Under this order *Luke Fahy* filed a charge on foot of the before-mentioned demand. The Master reported the facts specially, and found the sum due to him, in case the Court should be of opinion that, under the circumstances, *Luke Fahy* was entitled to be reported as a creditor in respect of his demands upon the residue of the funds in bank produced by the sale.

Edward Thomas Beytagh moved, at the Rolls, that the special point in the report be ruled in his favour; and that it might be declared that no part of the said fund was appli-

ble to the payment of *Fahy's* demand. The Master of the Rolls having made an order accordingly, *Luke Fahy* appealed from His Honor's order.

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The Attorney-General (Mr. *Greene*) and Mr. *Frederick Walsh* for *Luke Fahy*.

The damages sustained by *Patrick Fahy*, by reason of a breach of the covenant for quiet enjoyment after the demise of the covenantor, constitute a debt within the meaning of the trust for payment of the just debts of the covenantor: *Freemoult v. Dedire*(a); *Plumer v. Marchant*(b); *Minkins v. Briant*(c); *Ex parte Tindal*(d); *Pearson v. Arch-aken*(e); *Wilson v. Leonard*(f). Such damages may be ascertained by the Master, on a reference for the purpose: *utton v. Mashiter*(g). The cases of *Wilson v. Knubley*(h) and *Farley v. Briant*(i) were decided upon technical grounds, and do not apply to the present case, where the question is, what was the intention of the testator? The decree of 1820, in *Fahy v. Bermingham*, is conclusive that those cases do not apply to the present. The statute of Limitations 2 & 3 Will. IV. c. 27, is not a bar; for here there is an express trust for payment of debts: *Dillon v. Cruise*(k); *bergus v. Gore*(l); *Salter v. Cavanagh*(m). Also the demand has been kept alive by the proceedings in *Bermingham v. Burke* and *Fahy v. Bermingham*; and by the circumstance that the fund in Court has been carried to the credit of the cause expressly for the purpose of satis-

(a) 1 P. Wms. 429.

(b) 3 Burr. 1380.

(c) 6 Sim. 603.

(d) 8 Bing. 402; S. C. 1 Mo. & Sc. 607.

(e) Al. & Nap. 23.

(f) 3 Beav. 373.

(g) 2 Sim. 513.

(h) 7 East, 128.

(i) 3 A. & E. 839.

(k) 3 Ir. Eq. R. 70.

(l) 1 S. & Lef. 107.

(m) 1 Dru. & Wal. 668.

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fying thereout this demand, amongst others: *O'Kelly v. Bodkin*(a); *Sterndale v. Hankisson*(b); *Gillespie v. Alexander*(c).

Mr. Monahan and Mr. Maley, for *Edward Thomas Beytagh*, relied upon *Wilson v. Knubley* and *Farley v. Briant*: and argued that the demand was barred by the Statute of Limitations; *Knox v. Kelly*(d); *Berrington v. Evans*(e): and that *Fahy's* suit was out of Court by the operation of the 81st General Order; the bill of revivor not having been filed by leave of the Court, as required by the Order of 1799, which was similar to the 58th General Order.

Judgment. THE LORD CHANCELLOR:—

The point originally argued before me was, that although the Master of the Rolls was right in holding that the devise was not void against the person claiming under the covenant, upon the authority of *Wilson v. Knubley*(f), yet the parties here were bound by the decree of 1820. I desired the case to be re-argued upon the question whether the creditor, although he could not claim *against* the devise, was not entitled to come in *under* it. And now it has been insisted, first, that he is not a creditor within the trust; and, secondly, if he be, a new point is raised,—that he is barred by the Statute of Limitations.

1. The claim was under a covenant binding the heirs, for unliquidated damages; and there certainly was no breach in

(a) 3 Ir. Eq. R. 390.

(b) 1 Sim. 393.

(c) 3 Russ. 130.

(d) 6 Ir. Eq. R. 279.

(e) 1 Y. & Col. 434.

(f) 7 East. 128.

the covenantor's lifetime; but still, when a breach did happen, it was a liability payable out of the assets of the covenantor, and also out of the real assets descended to the heir. But it is argued that it was not, within the words of the will, just debt, which the testator owed at his death. The trust is to pay all such just debts of every kind, as he should happen to owe at his decease. The authorities relied upon were *Wilson v. Knubley*(a), and *Farley v. Briant*(b); but the strict construction of the technical term "debt," in a Statute giving a new remedy against devisees, can hardly govern a case depending upon the intention of a testator. Before the Legislature bound all the assets by debts of the present description, a man was said to sin in his grave who did not sufficiently provide for his debts. It could not be disputed that this claim must have been admitted, had the testator simply said, "all my just debts". It appears to me that is what he intended; and the supposed words of restriction are introduced only not to confine the trust to the debts which he then, that is, at the time of making his will, owed. The will does not use technical terms in any very precise sense; or the testator having directed, in the first place, all such debts as he should owe at his decease to be raised out of the rents, or by sale or mortgage, declares a further trust to raise 4000*l.*, the greater part of which he disposes of in the way of legacies; and then directs 290*l.*, the residue, to be paid to his executors, to be applied to the payment, as far as the same will reach, of any notes, bills or shop accounts, due by him. A note or bill which at his death had some time to run, would clearly fall within this trust, if the fund were sufficient to meet it. The testator then devises his estates, subject to the payment of his debts and legacies aforesaid," to the *Berminghams*, and he directs his executors to apply

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(a) 7 East. 128.
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(b) 3 A. & E. 839.
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his general personal estate, which he should happen to have or be entitled to at his decease, in exoneration of his real estates, in the first place, towards payment of his debts; and if a redundancy, towards the discharge of his legacies. I think this direction strengthens my view of the first trust: he considered, I think, the real estate as charged with all the debts which would affect his personal estate; and as he meant the latter to be the first fund, he directed it to be applied generally towards payment of his debts, which would include all obligations, whether by specialty or simple contract, whether contingent or payable presently, whether ascertained at his death or unliquidated until a later period. And this payment was to be made in exoneration of his real estate, which proves the general nature of the trust of the real estate. It appears to me, therefore, that Mr. *Fahy's* claim is one directed to be paid by the will^(a). This Court must have taken the same view of the case, when the decree in *Fahy's* suit was pronounced; and again in *Bermingham's* suit, when *Fahy* and the other evicted tenants were held to be entitled to retain, out of the portion of their rents belonging to the trustees as devisees under the will, the loss which they had sustained by the eviction by the doweress.

2. I am to consider whether the demand is one upon which the Statute of Limitations could operate, having regard to the proceedings in this Court. The eviction upon which the claim arose did not take place until 1797, four years after the testator's death; and in 1804 the lessee filed his bill to establish his demand to a charge on the real estate, when the amount should be ascertained. It was said that the sole defendant was *Nicholas Bermingham*,

(a) See *Morse v. Tucker*, 5 Ha. 79.

the younger, the principal devisee of the real estate, and also personal representative: and even if that were so, as he took the estate expressly subject to the debts, he could not now be heard to say that the suit was not properly instituted. But that statement was, I find, erroneous. The heir at law of the surviving devisee in trust was also a party, and answered the bill. In 1820 the plaintiff in that suit obtained an absolute decree, directing an account to be taken of the real estate, declaring the sum to be ascertained a sufficient charge on the real estate, and that he should be paid the same out of such estate. The plaintiff did not follow the directions of the decree as to the mode of ascertaining the demand, but brought an action against *Nicholas Bermingham*, and obtained final judgment against him in 1822, for upwards of 500*l*. Here, the direct proceedings ended; for the plaintiff having died in 1822, administration was not obtained to him until 1841; and although a bill of revivor was then filed, yet no order of revivor was obtained. It does not appear whether the previous leave of the Court was obtained for the filing of this bill, according to the order then in operation, of June, 1799. It will presently be seen why no attempt was made to prosecute this suit further. The Rules of 1843 would now prevent a bill of revivor from being filed, without the special leave of the Court. So far the new Statute of Limitations has no operation upon these proceedings, which commenced long before that Act passed; and the right of *Fahy's* representatives to proceed would depend on the rules of the Court.

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It is now necessary to advert to the proceedings in *Bermingham's* suit. That was the suit of the beneficial devisees, one of whom was the personal representative; and

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in 1799 the usual decree was made, under which *Faly* might have gone in; although I am not surprised that he filed a separate bill, considering the nature of his demand. Now, as to the authorities, I think that the principles upon which the Court acts, are correctly laid down in *Sterndale v. Hankisson*(a) which was decided before the new Statute of Limitations. *Berrington v. Evans*(b), before Lord Abinger was, I apprehend, properly decided: but it does not impeach the previous decision; nor does it, I think, prevent a creditor from coming in under another creditor's bill, filed for the general benefit of creditors, where his demand would not have been barred had he himself filed the bill, and he comes in according to the decree and the course of the Court. Courts of Equity should be cautious not to render it necessary for every creditor to file a bill upon his debtor's death, in order to raise his demand, where one suit is regularly instituted. The Court of Exchequer here appears to have acted on this view in *O'Kelly v. Bodkin*(c) in which case the bill was filed before the Statute. With these observations, I resume the consideration of the proceedings in *Birmingham's* suit.

In 1805 a decretal order was made, and the case is reported in 2 S. & Lef. 444. But, in addition to the decree as there stated, it was ordered, according to the Registrar's book, which I have examined, that the Master should inquire whether any demand had been incurred against the trust estate in consequence of the demand of dower made by Mrs. *Burke* (the widow, who had married again), to defeat leases executed by the testator, of any part of the estates which had been avoided by her claim of dower; and the Mas-

(a) 1 Sim. 393.

(b) 1 Y. & C. 434.

(c) 2 Ir. Eq. R. 361; 3 Ir. Eq. R. 390.

ter was to state whether any and what demand had been occasioned thereby against the testator's estate, to be raised by sale or mortgage under the trusts of his will; and it was declared that Mrs. *Burke* could not claim the benefit of the *legacy* given to her by the testator's will, without confirming such leases, or making good such demand against the testator's estate. This, I may observe by the way, materially alters the rule as laid down by Lord *Redesdale* in the report; for it does, I know not upon what principle, put the widow to her election as to acts by the testator *inter vivos*. Upon a rehearing in 1812, before Lord *Manners*, he declared that the widow could not claim the benefit of any other devise or bequest, any more than of the legacy given to her, without making good the loss sustained by her having avoided leases made by the testator: but she was still allowed to elect; and was driven, by the extent of the demand against her, to elect to take against the will, and to rely on her dower only.

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The Master, under the decree of 1799 and the decretal order of 1805, made his report in 1810; and he found that "a demand had incurred against the trust estate," in consequence of the demand of dower. He found the leases which had been granted by the testator, including the lease to the *Fahy's* and *Lane*; that the widow had avoided them; and that "a demand had been occasioned thereby against the trust estate," on the foot of the leases so avoided, amounting to a very large sum, which he states, "the several tenants, whose leases had been so avoided, having retained to that amount out of the rents payable in respect of the other two-thirds of the lands demised to them, in right of the covenants for quiet enjoyment contained in the leases made by the testator." This report, therefore, pro-

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ceeded upon *Fahy's* right to be recouped, in effect out of the trust estate to be administered in that cause, the loss sustained by the eviction, although it misstated the fact as far as regarded *Fahy's* having repaid himself out of the other two-thirds of his rent up to a certain time; for it appears by the report now before me, unexcepted to, that the widow had the whole of *Fahy's* property allotted to her as part of her dower. The report of 1810 was absolutely confirmed, and was followed by a further decree for carrying the trusts of the will into execution; and the widow, having then elected to take under the will, was decreed to make good the loss occasioned by her act. In 1812 the rehearing took place; the trusts of the will were once more directed to be carried into execution; the debts reported and legacies to be paid; and the bulk of the real estate to be sold.

The estate having been sold, the Master made his report in July, 1816, and he found that a good title could be made to the purchaser, subject to several unsatisfied judgments, "and also subject to such sum of money as may be decreed in a cause wherein *Fahy* is plaintiff, and *Bermingham* a defendant, the said purchaser having consented before me to waive the objection from the pendency of the said suit, upon a sufficient sum being lodged in Government security to the credit of the cause, to answer such sum as may eventually be decreed." And he found that the residue of the purchase-money should be invested accordingly for the protection of the purchaser, until the judgment debts were satisfied and the said suit determined. In the same month the allocation order was made, and the residue was to remain for the purposes in the report mentioned.

The leading object was to secure the purchaser; but the provision for *Fahy's* demand proves that the parties no longer relied upon the erroneous finding that he had paid himself by retainer; and, having a cause of his own in Court, it would have been quite of course, when he had established his demand in that cause, to have applied for payment out of the fund set aside to answer it; a fund, it will be borne in mind, liable to make good the demand under the trusts of the testators will. *Fahy's* demand, therefore, up to this period, was not only one, which, if established, must have been paid for the purchaser's security, according to his contract with the Court, but it must have been paid on the higher ground that the fund was the proper one for payment of it. This was followed by the decree of 1820, in *Fahy's* suit, and his final judgment in 1822. Those proceedings dovetail in with the proceedings in *Bermingham's* suit, and in this respect the case is wholly distinguishable from the case of *Berrington v. Evans*. The Statute of Limitations, therefore, has no operation; and the case depends upon the rules of the Court. Now the delay has been a long one; but it is accounted for by the period, which elapsed before administration was granted to *Fahy*, although that would be no excuse under the Statute, and ought not to be in this Court: but the fund remains in Court to be distributed; it has been appropriated to no one; the first demand upon it is *Fahy's*; and the Master, by the report of this year, now before me, finds that *Fahy* was not reimbursed the loss sustained by the eviction; and that it was in consequence of the proceedings under the order of reference of February, 1841, made in *Bermingham v. Burke*, and the advertisement for creditors, that the administrator of *Fahy* discontinued any further proceedings on foot of the bill of revivor in *Fahy v. Bermingham*, and came in and

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filed a charge, and proceeded to ascertain his demand before him, under the order of reference. Under these circumstances, I am of opinion that *Fahy's* demand cannot, in this Court, be affected by the Statute of Limitations; but that, the time having at length arrived for payment of the money set apart, this must be paid as a charge upon it. The proceedings in the two causes, taken together, have kept alive the demand. I am thus relieved from considering whether this demand could be considered as barred by the new Statute of Limitations, notwithstanding the trust for payment of the debts, and that a portion of the trust fund still remains in Court to be distributed; for, assuming that the Statute might have had that operation, I have satisfied myself that the proceedings in these causes would prevent the bar.

CURTIN v. DARCY.

November 17.

The grantor of a rent-charge was discharged as an insolvent, but still continued in possession of the lands:—*Held*, that the assignee of the insolvent ought to be made an answering party to a bill by the grantee, to raise the arrears by means of a receiver.

THE bill was filed to raise the arrears of a rent-charge, granted in 1836, by means of a receiver over the lands. It did not pray a sale.

The defendant, the grantor of the annuity, objected that in 1840, he had been discharged as an insolvent; and that his assignee, who was made a notice party, ought to have been made an answering party to the bill.

Mr. *Pigot* and Mr. *D. R. Kane*, for the plaintiff, said that it was in proof that the insolvent was in possession of the lands; that the object of the bill was, not to disturb the

title to the estate, but only to affect the possession ; and that it had always been considered sufficient in cases of this nature, to make those persons only parties, whose possession was sought to be disturbed.

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THE LORD CHANCELLOR :—

Has that practice ever been extended to the case of an insolvency? You are asking the Court to proceed against a person, in possession, who is no longer the owner of the estate. Unless an authority be produced, I must yield to the objection.

Judgment.

The plaintiff had liberty to amend by making the assignee an answering party.

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25.

A., being seised in fee of Ard-gullen, confessed a judgment: and afterwards, upon the marriage of his son *B.*, conveyed the lands to the use of *B.*, for his life, re-

mainder to the issue of the marriage; and covenanted that they were free from incumbrances. By his will he gave several legacies, and died, having appointed *B.* his executor, and leaving assets more than sufficient to pay all his debts and legacies. Upon the marriage of *C.*, one of the legatees, a settlement was executed, whereby, after reciting the will of *A.*, and that the legacy of *C.* was then in the hands of *B.*, as executor, *C.* assigned the legacy to trustees, of whom *B.* was one, upon trust for *C.* for her life, and, after her decease without issue, upon trust for the benefit of the judgment creditor and his issue. In 1835 the judgment creditor instituted a suit for payment of his judgment out of the real and personal assets of the testator. In 1836 *C.* and her husband (there being no issue of their marriage) instituted another suit against *B.* and the persons entitled under their settlement in default of issue of their marriage, for the appointment of new trustees, and an account of the trust funds; and in that suit an order was made, on the consent of *B.*, but without notice to the persons entitled in default of issue of *C.* and her husband, that *B.* should transfer to the credit of that cause, stock to the value of *C.*'s legacy, without prejudice to the rights of the parties; and it was ordered that the dividends thereof be paid to *C.* The stock was accordingly transferred by *B.*, who purchased same with the produce of the sale of part of the assets of the testator, which were outstanding in specie when the bill of 1835 was filed.

The assets having been wasted, the children of *B.*, claiming as specialty creditors of *A.* under his covenant, filed a bill in 1840, to have the stock standing to the credit of *C.*'s cause applied in payment of the judgment debt.

Held.—1. That the stock had not been appropriated to the payment of *C.*'s legacy, either as against the specialty creditors or the other legatees of *A.*, but that it still continued assets for payment of his debts and legacies.

2. That a purchaser for value of a legacy was but a purchaser of a chose in action; and that he was subject to the same equities, in respect of the legacy, as his vendor; and therefore to refund it if necessary for the payment of debts.

3. That a suit by a judgment creditor, for an account of the real and personal estate of his debtor and payment of his debts, is a sufficient *lis pendens* to affect an incumbrancer on the life estate of a defaulting executor in lands, the fee of which was subject to the judgment, with notice of an equity to have the life estate applied to answer the default of the executor.

4. Where the question is not between a registered and unregistered deed, notice by *lis pendens* is not affected by the registration of the title deed of the person sought to be affected thereby.

5. The 7 & 8 Vic. c. 93, s. 10, which requires that a *lis pendens* shall be registered to affect a purchaser, does not apply to a purchase made before the passing of the Act.

judgments thereon, each in the penal sum of 5000*l.*, conditioned for the payment of the principal sum of 2500*l.* within three months after the decease of them respectively; upon trust, in the event of *William Bond* dying in the lifetime of *Rebecca Bond*, without leaving issue by her (which event happened), as to the sum of 1500*l.*, part of the sum of 2500*l.*, secured by the bond and warrant of the Rev. *Wensley Bond*, for the said Rev. *Wensley Bond*, his executors, &c.; and as to the sum of 1000*l.*, residue thereof, in trust for *William Bond*, his executors, &c. Judgment was, in Hilary Term, 1820, entered upon the bond of the Rev. *Wensley Bond*.

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William Bond died in 1817; and by his will bequeathed to his wife, *Rebecca*, the interest on the 1000*l.* for her life. *Rebecca Bond* afterwards married the Rev. *William Jennings*; and by settlement of the 29th of February, 1820, to which the trustees of the judgment and the personal representatives of *William Bond* were parties, after reciting that judgment had been entered upon the bond of the Rev. *Wensley Bond*, it was declared that said judgment should be held by the trustees thereof, upon trust that the Rev. *William Jennings* should receive the interest thereof during the joint lives of himself and his intended wife; and as to the sum of 1500*l.*, part of the principal sum of 2500*l.*, secured by the judgment, from and after the decease of the Rev. *William Jennings*, upon trust for the children of the marriage as the Rev. *William Jennings* should appoint.

There was issue of this marriage several children, who, with their parents, were plaintiffs in the first and defendants in the second cause.

In 1833, the executors of *William Bond* assigned to the

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Rev. *William Jennings* the sum of 1000*l.*, parcel of the sum of 2500*l.*, secured by the judgment of Hilary Term, 1820, for his own use and benefit.

By indenture of settlement, bearing date the 1st of April, 1820, executed in contemplation of the marriage of *Richard Wensley Bond*, the youngest son of the Rev. *Wensley Bond*, with Miss *Sophia Bond*, the lands of Ardgullen were conveyed to *James W. Little* and *George Little*, and their heirs, upon trust (*inter alia*) to permit *Richard W. Bond* to receive the rents thereof during his life; and after his decease, subject to a jointure for his wife, to the use of the children of the marriage as *Richard W. Bond* should appoint; and in default of appointment, to the children equally as tenants in common in tail general. And the Rev. *Wensley Bond* thereby entered into absolute covenants with *James W. Little* and *George Little* for title; and for quiet enjoyment, free from all former and other gifts, grants, bargains, sales, mortgages, judgments, settlements, jointures, dowers, rights and title of dower, and all other charges and incumbrances whatsoever, a certain lease therein mentioned only excepted.

At the time of the execution of this settlement there was not any other incumbrance affecting the lands, save the judgment of Hilary Term, 1820.

The marriage was celebrated; and there was issue of it seven children, who were the plaintiffs in the second cause.

The Rev. *Wensley Bond*, previous to the execution of the settlement of the 1st of April, 1820, made his will and three codicils thereto. By his will he devised the

lands of Ardgullen to his son, *Richard Wensley Bond*, and his issue, in strict settlement. That devise was revoked by the settlement of the same lands in 1820. By his will he also gave to his son, the Reverend *James Forward Bond*, and *Abraham H. Hutchinson*, all his other estates, assets, and effects, of every nature and kind soever, in trust for payment of his just debts, funeral, and other incidental expenses; and bequeathed to his daughter *Christiana* the sum of 3000*l.*, to his daughter *Louisa* 2500*l.*, and to his daughter *Catherine Tyrrell* 1000*l.*, and several other small legacies; and the remainder of his assets, if any, he bequeathed to his son, *Richard Wensley Bond*, his executors, administrators and assigns: and by his will he appointed his trustees and his son, *Richard Wensley Bond*, executors. The codicils did not affect the before-mentioned devises and bequests.

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In October, 1820, the testator died, possessed of personal estate amounting to 15,527*l.* 5*s.* 4*d.*, late currency. His will was proved by his executors, but *Richard Wensley Bond* alone acted in execution of it.

Richard Wensley Bond, as such executor, received out of the assets several sums, amounting in the whole to 13,879*l.* 5*s.* 4*d.*, late currency; of which he had received, prior to the filing of the bill in the first cause, the sum of 10,027*l.* 0*s.* 4*d.*; and, subsequent to the institution of that suit, he assigned and disposed of two judgments, obtained by him as executor against the Earl of *Courtown* and Viscount *Stopford*, and an annuity granted to the testator by Sir *James Bond*, and applied same in manner hereinafter stated; and so possessed himself of the residue of the sum of 13,879*l.* 5*s.* 4*d.* Out of the sums so received by him he paid

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the funeral and testamentary expenses of the testator, and all his debts, save the judgment of Hilary Term, 1820, amounting in the whole to the sum of 3214*l.* 19*s.* 6*d.*; late currency. He also paid thereout several of the legacies bequeathed by the testator, amounting in the whole to the sum of 1532*l.* 15*s.* late currency, leaving a sum of 9132*l.* 10*s.* 10*d.*, late currency, in his hands, to be accounted for by him to the creditors and legatees of the testator at the time of the filing of the bill in the first cause.

In 1822 *Louisa Bond* married the Reverend *Hugh Webb*; and by indenture of settlement, bearing date the 16th of November in that year, and to which the trustees and executors of the Rev. *Wensley Bond* were parties, after reciting the will of the Rev. *Wensley Bond* and the intended marriage, and that the legacy of 2500*l.* thereby bequeathed to *Louisa Bond* was in the hands of *Richard Wensley Bond*, as acting executor of the Rev. *Wensley Bond*, *Louisa Bond* assigned to *James Forward Bond* and *Richard Wensley Bond* the said legacy of 2500*l.*, upon trust to pay the interest thereof to the separate use of *Louisa Bond* during her life; and, after her decease, to pay same to *Hugh Webb*, during his life; and, in default of issue of the marriage (which event happened) in trust for *Christiana Bond* and *Catherine Tyrrell* equally.

Louisa Webb died in July, 1824, without issue; *Hugh Webb*, who thereupon became entitled to a life interest in the legacy of 2500*l.*, assigned same, on the 29th of October, 1835, to *James W. Bond*.

Christiana Bond, in 1826, married *Thomas Golfin Young*; and by indenture of settlement bearing date the 29th of May

in that year, to which the trustees and executors of the Rev. *Wensley Bond* were parties, after reciting the will of the Rev. *Wensley Bond*, and that the legacy of 3000*l.* bequeathed to *Christiana Bond* was then in the hands of *Richard Wensley Bond* as such executor; and that, under the limitations of the settlement of Mr. and Mrs. *Webb*, *Christiana Bond* had become entitled to the sum of 1250*l.*, one moiety of the legacy of 2500*l.* to which Mrs. *Webb* had been entitled, subject to the life interest of Mr. *Webb* therein; *Christiana Bond* assigned to four trustees, of whom *Richard Wensley Bond* was one, the legacy of 3000*l.*, and also the sum of 1250*l.*, upon trust, as to the interest thereof, to the use of *Christiana Bond* during her life; and after her decease, to pay the interest of the 3000*l.* to *Thomas Golfin Young* for his life; and to pay and apply the interest of the 1250*l.* to the maintenance and education of the issue of the marriage; but if no issue living at the death of *Christiana Bond*, then to pay the whole of the interest to *Thomas Golfin Young* during his life; and after the decease of the survivor of them, to pay the said principal sums to the children of the marriage, as *Christiana Bond* should appoint; and in default of appointment, equally amongst them; and if there should be no issue of the marriage, then as to 500*l.*, part of the 3000*l.*, for the sole use and benefit of *Thomas Golfin Young*; and as to the residue of the 3000*l.* and the said sum of 1250*l.* (subject to the life interest of Mr. *Webb* therein), to pay the interest thereof to the separate use of *Rebecca Jennings* during her life; and, after her decease, to pay the said principal sums of money to and amongst the children of *Rebecca Jennings*, by her then present or any future husband, as she should appoint; and, in default of appointment, equally.

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Mr. and Mrs. *Young* were living : there was no issue of their marriage.

In 1824, *Mary Tyrrell*, a daughter of *Catherine Tyrrell*, married *George Vaughan* ; and by indenture of settlement dated the 18th of October, 1824, *Catherine Tyrrell* assigned to trustees the sum of 500*l.*, being one moiety of the legacy of 1000*l.*, to which she was entitled under the will of the Rev. *Wensley Bond* and also the sum of 625*l.*, being one moiety of the sum of 1250*l.*, to which she became entitled on the death of her sister, *Louisa Webb*, expectant on the death of Mr. *Webb*, upon trusts for the benefit of *Catherine Tyrrell*, Mr. and Mrs. *Vaughan* and their issue.

There was issue of this marriage, several children. *George Vaughan* died in January, 1840.

Richard Wensley Bond, up to the year 1835, paid the interest on the sums of 3000*l.* and 2500*l.* to the persons entitled thereto. The other trustees named in the settlements never acted in the trusts thereof.

The bill in the first cause was filed on the 5th of November, 1835, against the heir at law, personal representative, and devisees under the will of the Rev. *Wensley Bond* : it set forth the title of the plaintiffs to the judgment of 1820, and the will of the Rev. *Wensley Bond* ; and charged that the Rev. *Wensley Bond* died seised and possessed of very considerable real and personal property, much more than sufficient, if properly applied, for the full payment of all his debts and legacies ; and that more than sufficient of said personal property came to the hands of *Richard Wensley Bond*, one of his executors, but that he had misapplied and

converted same to his own use ; and that no fund then remained available for payment of the judgment, save the real estates of the *Rev. Wensley Bond*. The bill further charged that *Richard Wensley Bond* had, with the assets, paid off incumbrances affecting certain estates which had been settled on himself, by his father-in-law, on his marriage ; and that the plaintiffs were entitled to pursue the assets for payment of their demand : and prayed that the rights of all parties under the will of the *Rev. Wensley Bond* might be declared ; and for an account of the real, freehold and personal estate of the testator ; and that the assets might be marshalled, and the trusts of his will carried into execution ; and if it should appear that any of the assets of the testator had been applied by *Richard Wensley Bond* in payment of any incumbrances affecting the estates settled by his marriage settlement, that same might be declared to be part of the assets of the testator ; and for an account of the estates comprised in such settlement, and sale thereof for payment of their liabilities aforesaid.

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On the 2nd of July, 1836, *Thomas G. Young* and *Christianiana*, his wife, filed their bill in this Court against *Richard Wensley Bond* and others ; and thereby prayed, *inter alia*, that *Richard Wensley Bond* and the other trustees of their settlement might be restrained from intermeddling with the trust monies, and might be removed from the trusts of the settlement, and that new trustees might be appointed in their place ; and that the trust funds might be assigned to such new trustees ; and that *Richard Wensley Bond* might be ordered to vest in Government three and a half per cent. stock, with the privity of one of the Masters of the Court, the said two sums of 3000*l.* and 1250*l.*, late currency, and to transfer said stock to the Accountant-General of the

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Court, to the credit of the cause ; or otherwise might be ordered to lodge said sums of 3000*l.* and 1250*l.* in the Bank of Ireland, to the credit of the cause, with the privity of the Accountant-General ; and that all necessary accounts might be taken.

Richard Wensley Bond, after the filing of the bill in the first cause and shortly previous to the filing of the bill by *Young* and wife, sold part of the personal estate of his testator, viz., the two judgments obtained by him as executor, in Easter Term, 1835, against the Earl of *Courtoun* and Viscount *Stopford*, for the principal sum of 923*l.* 1*s.* 6½*d.* ; and a judgment of same term, obtained by him as executor, against the Earl of *Courtoun*, for the principal sum of 461*l.* 10*s.* 9*d.* ; and the annuity of 100*l.*, late currency, granted to the testator by Sir *James Bond* for an unexpired term of years. The judgments were assigned by him to Mr. *Webb*, by indenture of the 24th of December, 1835, in consideration of the sum of 1000*l.* ; and the annuity was assigned by him to Mr. *E. Gibbon*, by indenture of the 1st of May, 1836, in consideration of the sum of 1400*l.* ; and he applied the produce of these sales in the investment made by him to the credit of the cause of *Young and Wife v. Bond*, hereinafter mentioned.

The Master, in the report hereinafter mentioned, found that *Richard Wensley Bond* was, at the time of the filing of the bill in the first cause, possessed, as executor of the Rev. *Wensley Bond*, of the said judgments and annuity ; and that he sold and disposed of same to enable him to invest the trust fund mentioned in the settlement of *Young* and wife to his own credit, as trustee of said settlement ; and that he so applied the produce thereof.

By an order of the 7th of July, 1836, made in the cause of *Young and Wife v. Bond*, it was, on the consent of *Richard Wensley Bond*, ordered, that he should transfer to the credit of the cause the sum of 2762*l.* 14*s.* 4*d.*, being equivalent, at the price of the day, to 3000*l.*, late currency, in Government three and a half per cent. stock so invested to his credit with the produce of said assets, without prejudice to the rights of the parties at the hearing of the cause; and it was ordered that the Accountant-General should from time to time draw in favour of the defendant, *Christiana Young*, for the accruing dividends of said stock. Pursuant to this order, *Richard Wensley Bond* transferred the sum of 2762*l.* 14*s.* 4*d.*, three and a half per cent. stock, to the credit of the cause; which transfer, the Master reported, was intended by him to be an appropriation thereof, in payment of the legacy of 3000*l.* in that suit.

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The plaintiffs in the first cause, although named as parties defendants in the cause of *Young and Wife v. Bond*, were never served with process therein: and immediately after the order of July, 1836, was made, they were, by amendment, struck out as parties defendants; and no further proceedings were had in that suit.

The bill in the second cause was filed on the 9th of June, 1840, by the children of *Richard Wensley Bond*, all of whom were minors, against the plaintiffs in the first cause, *Richard Wensley Bond*, *Young* and wife, and others; setting forth the marriage settlement of the 1st of April, 1820, and the covenant against incumbrances therein contained; and the proceedings in the first cause, and in the cause of *Young and Wife v. Bond*; and charging that the personal assets of

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the testator were the primary fund for payment of the judgment debt due to the plaintiffs in the first cause, and ought to be so applied; and that the investment of the 3000*l.* by *Richard Wensley Bond* was made with the concurrence and at the instigation of *Jennings* and his wife, they and their children being entitled to the greater portion of that fund on the decease of *Thomas Golfin Young* and his wife: and they submitted that the investment was an improper application of the assets, and done in collusion with *Jennings* and wife by *Richard Wensley Bond*, in order to prevent a proper account being taken of the assets; and that the assets of the testator could not be properly administered in the suit of *Jennings v. Bond*, as *Young* and wife and the other persons interested in the assets, were not parties to that suit.

The bill prayed that the trusts of the settlement of the 1st of April, 1820, so far as same related to the lands of *Ardgullen*, might be carried into execution, and the rights of the plaintiffs declared; and that the covenant of the *Rev. Wensley Bond* therein contained might be specifically performed; an account of the sum due on foot of the judgment of 1820, and of all incumbrances prior to the settlement of 1820, affecting the lands of *Ardgullen*; an account of the personal estate of the testator, and of any real estate which descended upon his heir; an account of his debts and legacies, and that the personal estate might be applied in a due course of administration, and thereout the judgment debt of 2500*l.* be paid; and, if necessary, that the said Government stock standing to the credit of the cause of *Young and Wife v. Bond*, might be transferred to the credit of this cause, to be applied for the purposes aforesaid, under the directions of the Court; and that it might be declared that the plaintiffs were entitled to have the lands indemnified against the payment of any incumbrances thereon, out of the assets of the

testator: and for a receiver, and an injunction to restrain the defendants interfering with the assets.

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By an order of the 10th of February, 1841, made in the second cause, it was ordered that the Government stock lodged to the credit of the cause of *Young and Wife v. Bond* should be transferred to the credit of that cause and of the second cause; and that the defendant, *Christiana Young*, should continue to receive the half-yearly dividends thereon. The stock was transferred accordingly.

There were assets of the testator still outstanding, to the amount of 3162*l.* 8*s.*, late currency; of which the sum of 300*l.* was irrecoverable.

By indenture of the 6th of September, 1838, between *Richard Wensley Bond*, of the one part, and *James W. Bond*, of the other part, after reciting, *inter alia*, that *James W. Bond* held the lands of Ardgullen, as tenant to *Richard Wensley Bond*, at the yearly rent of 212*l.* 15*s.* 10*d.*, *Richard Wensley Bond*, in order to secure the repayment to *James W. Bond* of the sum of 2434*l.* 15*s.* 3*d.*, the amount of an old debt and a sum then advanced to him, assigned to *James W. Bond* certain policies of assurance; and it was thereby agreed upon between them that it should be lawful for *James W. Bond*, his executors, &c., and he and they were directed and empowered, every year thenceforth, during the life of *Richard Wensley Bond*, to apply so much of the yearly rent of 212*l.* 15*s.* 10*d.* as should be necessary to pay the premiums on the policies of assurance; and, after payment thereof, to retain and pay himself thereout the yearly interest on the sum of 2434*l.* 15*s.* 3*d.* The annual sums which *James W.*

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Bond was so authorized to retain out of his rent, amounting to 211*l.* 19*s.* 9*d.*; and *James W. Bond* and his executors accordingly retained that annual sum up to the 1st November, 1843; but a receiver having been appointed over the lands in April, 1844, they had not since retained same. The principal sum of 2434*l.* 15*s.* 3*d.*, with interest, was still due to the executors of *James W. Bond*. By the same deed of the 6th of September, 1838, after further reciting that the assignment of the 29th of October, 1835, whereby Mr. *Webb* had assigned to *James W. Bond* the interest of the legacy of 2500*l.*, to which he was entitled under his marriage settlement, had been executed to him in trust for *Richard Wensley Bond*, and that the sum of 750*l.*, thereby stated to have been paid to Mr. *Webb*, was the proper money of *Richard Wensley Bond*; it was agreed that, in the events therein mentioned, the yearly interest of the 2500*l.* should be a further security for the money due by *Richard Wensley Bond* to *James W. Bond*. This deed was registered shortly afterwards.

James W. Bond died in February, 1843; his executors were parties to both causes.

Under a decree to account, pronounced in the two causes of *Jennings v. Bond* and *Bond v. Jennings*, on the 28th of April, 1843, the Master reported the before-mentioned matters; and further found, that the plaintiffs in the second cause were entitled, as specialty creditors of the Rev. *Wensley Bond*, on foot of the covenant contained in the settlement of April, 1820, to have the settled lands indemnified against all incumbrances out of the personal estate of the said Rev. *Wensley Bond*, to which said lands might be made liable, without prejudice to the rights of the plaintiffs in the first cause on foot of their judgment.

To this report, the plaintiff in the second cause took two exceptions : first, for that the Master by his report and the schedule thereto annexed, did not, in the account of the personal estate of the testator still outstanding, report that the sum of 2762*l.* 14*s.* 4*d.*, Government three and a quarter per cent. stock, invested to the credit of the second cause and of the cause of *Young and Wife v. Bond*, formed a portion and was part of the personal estate of the testator : secondly, for that no account of the sum due on foot of the legacy of 3000*l.* bequeathed to *Christiana Young*, was taken by the Master, pursuant to the decree ; nor did the Master report whether any payment had been made on foot of that legacy out of the personal estate of the testator.

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Mr. Moore, Mr. Brewster, and Mr. Brereton, for the plaintiffs in the second cause. Argument.

The Government stock which is now standing to the credit of the cause of *Young and Wife v. Bond* and of the second cause, is the produce of the sale of part of the assets of the testator, which were in specie when the bill in the first cause was filed ; and it has never been definitely appropriated to the payment of Mrs. *Young's* legacy, but is still under the control and disposition of the Court. It, therefore, is applicable to the payment of the debts of the testator ; and ought to be so applied in priority to his real estate. The bill in the first cause prayed for an account of the personal assets of the testator ; and after that suit was instituted, it was not competent for the executor to pay legacies. The order, also, under which the legacy was brought into Court in *Young's* cause, was made on the consent of the executor, and was without prejudice to the rights of the parties as they should appear at the hearing. The plaintiffs in the first cause were then parties to the suit of *Young and Wife*

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v. *Bond* ; that reservation in the order is therefore conclusive against its being considered as an appropriation of the money in payment of Mrs. *Young's* legacy. *Gillespie v. Alexander(a)* is distinguishable ; for there the appropriation was made by a decree ascertaining the rights of the parties. But if the effect of that order was to appropriate the fund to the payment of the legacy, yet as the persons claiming under Mr. and Mrs. *Young's* settlement, though purchasers for value, are only purchasers of a chose in action,—viz., the legacy,—they must take it subject to the same equities to which it was liable in the hands of the legatee : they are therefore bound to refund it, if it be wanted for payment of the debts of the testator : *March v. Russell(b)*. The case of *Chamberlaine v. Chamberlaine(c)* differs from the present ; that was the case of a bequest of a term for years, to which the executor had assented ; and even in such a case, the assets may be followed in the hands of a purchaser from the legatee within reasonable time : *Cholmondley v. Orford(d)*. The circumstance that the assets were originally sufficient, does not preclude the creditors from compelling the legatee to refund : *Hardwicke v. Mynd(e)*.

Mr. Sergeant *Warren* for the plaintiffs in the first cause, and Mr. *Brooke* for Mr. and Mrs. *Young* and their children.

The lodgment of the money in Court to the credit of the cause of *Young and Wife v. Bond*, pursuant to the order, was a valid appropriation of the stock to the payment of Mrs. *Young's* legacy : *Gillespie v. Alexander(f)* ; *Hill v. At-*

(a) 3 Russ. 130.

141.

(b) 3 M. & Cr. 31 ; see *Mannix v. Drinan*, 3 Ir. Eq. R. 108.

(d) Cited 3 Sug. Ven. & Pur. 434.

(e) 1 Aust. 109.

(c) 1 Ch. Ca. 256 ; S. C. 2 Freem. (f) 3 Russ. 130.

Amson(a); *Coombe v. Trist*(b): and the legacy cannot be followed by a creditor of the testator, in the hands of a purchaser for value: *George v. Millbank*(c); *Chamberlaine v. Chamberlaine*(d); *Sparkman v. Timbrel*(e); *Cholmondley v. Orford*(f); *Nugent v. Giffard*(g); *M^cLeod v. Drummond*(h). The pendency of the suit of *Jennings v. Bond* did not prevent the executor paying Mrs. *Young's* legacy; for, in a judgment creditor's suit, the Court will not make a decree for the general administration of the assets: *Bomford v. Wilme*(i).

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THE LORD CHANCELLOR:—

The question is whether this sum of money forms part of the assets of *Wensley Bond*, or whether it has been so appropriated to payment of the legacy to Mrs. *Young*, that it cannot now be resorted to as such. *Wensley Bond* by his will gave certain legacies to his younger children, and amongst them a sum of 3000*l.* to his daughter, *Christiana*, afterwards married to Mr. *Young*; and appointed his son, *Richard Wensley Bond*, one of his executors. At the time of his decease he was indebted by judgment and otherwise; but although *Richard Wensley Bond* received sufficient assets to answer both debts and legacies, he neglected to pay, amongst other debts, the judgment to which *Jennings* was entitled, and the legacies to the younger children of the testator. The legacy to which Mrs. *Young* was entitled, was, by her marriage settlement of the 29th of May, 1826, as—

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(a) 2 Mer. 45.

(b) 1 M. & Cr. 69.

(c) 9 Ves. 190.

(d) 1 Ch. Ca. 256; S. C. 2 Freem.

141.

(e) 8 Sim. 260.

(f) Cited 3 Sug. Ven. & Pur. 434.

(g) 1 Atk. 463.

(h) 17 Ves. 152.

(i) Beat. 253; Seton on Decrees.

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signed by her to four trustees (of whom *Richard Wensley Bond* was one), upon trusts for Mrs. *Young*, her husband, and the issue of the marriage. That settlement recited the will of *Wensley Bond* and the title of Mrs. *Young* to the legacies, and that the amount thereof was, at that time, in the hands of *Richard Wensley Bond*, as executor of his father. No specific portion of the assets was assigned by the settlement; it was a mere transfer of the legacy for value; and the persons claiming under the settlement stood in the situation of the legatee; for, though purchasers, they were purchasers of a chose in action. Under the settlement, therefore, they had no right to say, that any specific portion of the assets had been appropriated to the payment of the legacy. Upon the 5th of November, 1835, a bill was filed by *William Jennings*, a judgment creditor, praying for an account, in the most general way, of the real and personal assets of *Wensley Bond*, and that provision might be made for payment of all his creditors of every degree; and perhaps it was necessary to pray for those accounts, considering the peculiar situation and liabilities of the assets. To that bill *Richard Wensley Bond* was a party. Nothing was done in that cause for some time; and in 1836, *Young* and wife filed their bill for their legacy, alleging that *Richard Wensley Bond* had sufficient assets to answer their demand; and to that suit they made *Jennings*, the plaintiff in the suit of 1835, a party. Now the executor, being a party to the suit of 1835, without resorting to the doctrine of *lis pendens*, was of course aware of its institution; but so also was every person in contemplation of this Court; for it was strictly a *lis pendens*, and, consequently, the parties who filed the bill of 1836 did so with full knowledge, in the view of this Court, of the existence of the suit of 1835. It has been said that, in the suit of 1835, there never could have

een a decree which would have embraced all the creditors ;
 nd therefore, that the suit of 1836, being instituted by a
 :gatee, was properly constituted for the complete adminis-
 ration of the assets ; and it has been urged, that no decree
 ould be made in the suit of 1835 which would affect the
 ights of the parties to the suit of 1836. I do not think
 hat is the case ; for, whatever may be the value of the obser-
 vations of Sir *A. Hart* in *Bomford v. Wilme*(a), it appears
 hat such decrees are made every day, and no doubts have
 een entertained as to the power of the Court to made a de-
 cree embracing all the assets and creditors in such a suit.
 But the answer to the objection is this : that, assuming that
 he Court ought not to make a decree beyond the rights of
 he judgment creditor, yet such a decree would be one af-
 ecting all the assets,—the personal, of course, before the
 eal,—and for a distribution of such amongst that class of
 reditors. If, therefore, the suit of 1835 would not have
 uthorized a decree embracing all the creditors, yet it is
 undeniable that it was so framed as to compel the Court to
 decree an account of all the assets. It is of course, in such
 decrees, to inquire as to the personal estate, and, if that be
 ot sufficient, then as to the real. Therefore, I am of opi-
 ion that the suit of 1835 was properly constituted for the
 administration of the personal as well as of the real assets of
 he testator, although, with respect to creditors, it might not
 nclude any class beyond judgment creditors.

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Assuming that to be so, consider what was done in the
 suit of 1836. *Richard Wensley Bond*, who had incurred the
 liability to the legatee, and was himself a trustee for Mr.
 and Mrs. *Young* under the deed of 1826, was called on be-

(a) Beatty, 253.

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fore the suit to transfer to the trustees of the settlement the amount of their legacies. He had at that time in his possession, admitted assets, not then converted, consisting of certain judgment debts and an annuity, to which the testator had been entitled in his lifetime. He refused, however, to make the transfer; but ultimately, having converted those assets into money, and invested the produce in three and a half per cent. stock, he, pursuant to the order of the Court, transferred that stock to the name of the Accountant-General, to the credit of the second cause; but the order directing that transfer to be made was upon the terms that the transfer was to be made without prejudice to the rights of the parties at the hearing of the cause. I cannot doubt that *Richard Wensley Bond* did not mean to commit himself by actually assuming power over the fund; but he meant, as far as he could, to assist the *Youngs*, by bringing the money into their suit, and thereby at the same time to indemnify himself. I think it clear that there was some management by the parties, so as best to support their own interests at the expense of the creditors; for as soon as this order was pronounced, the *Youngs* dismissed their bill against *Jennings*, the object of which was to leave themselves unembarrassed in their suit. Without looking, then, to the suit of 1840, consider whether at that moment there was either payment or appropriation to the payment of this legacy. It is clear that there was no payment, for the executor had refused to pay the money to the trustees. Then was there an appropriation? I do not know how it can be so called; for appropriation (in the sense in which the word is used at the present hearing) means payment. In *Gillespie v. Alexander(a)* some of the legacies had been paid to parties competent to give a discharge for them; the other legacies were appropriated to the legatees who were

(a) 3 Russ. 130.

not then competent to give discharges for them; and the reason for the appropriation was, not that payment was not proper, but because the legatees were not ready to receive payment and give discharges. In that case appropriation was equivalent to payment; and the moment the party was competent to receive the money, it would be paid to him as of course. Here the case is different. The dividends in the funds in Court, it is true, were directed to be paid to Mrs. *Young*, the tenant for life; but that order was made upon the non-appearance of the executor, who then was the only party to the suit. What is the value of such an order? Could the executor, after a suit had been instituted, more than a year before, for the administration of all the assets, appropriate any portion of them, in the face of the Court, without informing it of the real circumstances of the case? This Court would be powerless, if it were to suffer an executor to act in that manner. I cannot permit an executor to say that, because the fact of there being a demand of a higher nature outstanding against the assets has been concealed by him from the Court, he is at liberty to satisfy a demand of an inferior nature, by means of payment of the assets into Court in a suit instituted by the owner of the inferior demand. I am of opinion that there was only an appropriation *sub modo*; that is, if, at the hearing, the party appeared to be entitled to the assets, the money was in Court to answer his demand. Before, however, that cause came to a hearing, the parties entitled to the specialty, hearing of the proceedings, filed a bill in the year 1840; and then the money in Court, to the credit of the cause of 1836, was transferred to the credit of both causes. I do not consider that had the effect of displacing any right acquired by the parties claiming under the suit of 1836, to the money; but *primâ facie* it affords an inference

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that the Court did not consider the payment into Court as an appropriation equivalent to an actual payment to the party. If there had been such an appropriation, the answer to the application to transfer the money to the credit of both causes, would have been, that the money already belonged to the parties in the suit of 1836, and that the plaintiffs in the suit of 1840 had no right to have it transferred to the credit of both causes. But it is plain that it was considered by the parties and the Court that that was a question to be decided at the hearing of the causes. I agree that, if it could be now established that there had been an appropriation, the parties would not be prejudiced by that order. The two suits came on together; and, so far from the persons claiming under the suit of 1836 thinking that the form of their suit gave them any peculiar claims, they allowed it to go to sleep; and with their permission a decree was made in the suits of 1835 and 1840. I do not say that that would damage them; but it shows that they did not consider that they had any peculiar claims under their suit.

It was argued that the parties stood on a higher footing, as purchasers for value under the deed of 1836. I have already answered that argument by stating the rule of the Court, that a purchaser of a chose in action stands exactly in the same position as the vendor: but I observed that the proposition was very cautiously laid down by the counsel who advanced it; for he said that, where a legacy was paid to a person who stood in the character of a purchaser for value, it could not be called back. As in the present case there has been no payment, I need not consider that proposition; it will be sufficient to do so when it arises: but I may observe that it will be difficult to maintain it where there is an existing *lis pendens*. The

case, therefore, lies in a very narrow compass, and is free from difficulty. This is a case in which I shall give to the creditors of the higher degree that right only to which by law they are entitled; and I give it to them over what were existing assets at the time when the bill of 1835 was filed, which now constitute the fund in Court, and over which the Court has never parted with its control.

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There is some difficulty from the form in which this question comes on. I shall let the exception stand; and declare that the transfer did not amount to an appropriation in payment of Mr. and Mrs. *Young's* demand, as against the creditors of the testator: and that, under the circumstances, the money brought into Court remained as assets of *Wensley Bond*, to be administered in a due course of administration. The report must go back to the Master, and he will appropriate the assets according to this declaration.

After the foregoing judgment was delivered, Mr. *Brooke* submitted that there were still outstanding assets sufficient to pay the demands of the plaintiff in the second cause; and that the fund in Court was applicable to the payment of Mrs. *Young's* legacy in priority to the claims of the other legatees, though not as against the creditor: and further, that the life estate of *Richard Wensley Bond* in the lands of Ardgullen ought to be made answerable for his default as executor.

The LORD CHANCELLOR directed the case to be argued upon these points.

Mr. *Brooke*, for Mrs. and Mr. *Young* and their children, as to the first point, relied on the circumstance that the

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fund in Court had been realized by the superior diligence of his clients; that it was paid into Court on account of and with the intention of its being applied in payment of Mrs. Young's legacy; and that where a legatee was paid his legacy, there being at the time sufficient assets in the hands of the executor to pay the other legatees, the legatee so paid could not be compelled to refund upon the executor subsequently wasting the assets: *Walcot v. Hall*(a), and Mr. Bell's note to it; *Anonymous*(b). As to the second question, he submitted that, as to *Richard Wensley Bond* himself, he could not resist the application; and that *James Wensley Bond* was not in a better condition, as he was a purchaser, *pendente lite*, of a mere equitable interest; and cited *Bishop of Winchester v. Paine*(c); *Culpepper v. Aston*(d); *Drayton v. Pocock*(e).

Mr. Brewster and Mr. Armstrong for *James Wensley Bond*.

There was no *lis pendens* in this case. The original bill, in *Jennings v. Bond*, having stated the title of the plaintiffs under the judgment of 1820, set forth the will of the Rev. *Wensley Bond*, whereby the lands of *Ardgullen* were devised to *Richard Wensley Bond* and his issue in strict settlement. It then stated, that on the marriage of *Richard Wensley Bond*, the lady's father had settled certain other lands on him and the issue of the marriage, and that he had possessed himself of the assets of his father, and applied them in discharging incumbrances affecting the lands which he derived from his father-in-law; but it did

(a) 2 B. C. C. 305.

(b) 1 P. Wms. 494.

(c) 11 Ves. 194, 199.

(d) 2 Ch. Ca. 115.

(e) 4 Sim. 283.

not contain any statement that the lands of Ardgullen were included in that settlement; and the relief prayed was the common one, for an account of the testator's real estate at the time of the rendition of the judgment, or since, and for specific relief in respect of the incumbrances alleged to have been paid off out of the assets. *Richard W. Bond*,

his answer, said that his title to the lands of Ardgullen was under the settlement of 1820, and not under the will. The plaintiffs, then, in March, 1840, two years after the date when *James W. Bond* acquired his mortgage security, amended their bill, and prayed specific relief against the lands of Ardgullen; and then, for the first time, there was a *lis pendens* as to those lands, and the claim of the plaintiffs was then only as creditors, and not as legatees. The rights of the legatees could not be adjusted in that suit, nor would the Court order them payment in it: *Walker v. Flamstead(a)*.

Again, the 7 & 8 Vic. c. 93, s. 10, provides, that from and after the 1st of November, 1844, no *lis pendens* shall affect a mortgage without express notice thereof, unless a memorandum of it be registered. That section is general in its language, and relates to existing as well as future *lis pendentes*; and as the *lis pendens* in the first cause has not been registered under it, *James W. Bond* is not affected by it: also, the deed under which *James W. Bond* claims to retain the rent has been registered; and a *lis pendens* is not such notice as will avoid a registered deed.

Mr. Gilmore and *Mr. T. K. Lowry* for *Catherine Tyrrell* and *Mary Vaughan*.

(a) 2 Ld. Kenyon, 57.

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THE LORD CHANCELLOR :—

Two points were reserved,—first, whether the funds in Court were appropriated to the payment of the legacy to the *Youngs*, as against the plaintiffs in the second cause before me ; and, secondly, whether any relief can be given against the purchaser.

Upon the first point *Walcot v. Hall(a)* was relied upon; but there the residue was paid, and the particular legacy was properly retained, as the executors were directed to invest it in their names. Here there has been no actual payment of the fund ; and it appears to me that there has been no appropriation of it, binding as against the persons having equal rights under the second cause.

Secondly :—for the purchaser it was insisted, first, that the *lis pendens* did not bind him, not relating specifically to the estate ; secondly, that it could not bind him, as he claimed under a registered deed ; and, thirdly, that his estate was saved by the recent Statute, which, to bind a purchaser, requires express notice or a registration. As to the first point, the plaintiffs in the suit of 1835, to recover the judgment, prayed the usual accounts of the real and personal estates, and a receiver of the real estate ; and the marriage settlement is referred to upon the misapprehension that the estate in it had been exonerated from debt out of the assets. I think that this was a sufficient *lis pendens* to bind a purchaser of the estate bound by the judgment, as real estate of the testator, and which was also comprised in the marriage settlement. The doctrine was laid down at large by two Chancellors in *Culpepper v. Austin(b)*, and I am not

(a) 2 B. C. C. 305.

(b) 2 Ch. Ca. 115, 221.

e of any case in which it has been laid down that such it as that of 1835 was not a sufficient *lis pendens* to a purchaser. *Walker v. Flamstead*, in the second of the second volume of Lord *Kenyon's* Reports, only led that a creditor's suit does not stop the execution of trusts of the will. It had been decided in Lord *Oxford* *arston(a)*, that an executor might pay a debt in equal ee with the plaintiffs after he had appeared to the plain- bill; which was most reluctantly followed by Sir *John ch* in *Maltby v. Russell(b)*: and there are other authori- to the like effect. But the case before me is of a different re. The estate in question was vested in the testator ie time of the judgment recovered; his subsequent set- ent of it did not affect the right of the judgment cre- . Mr. *Richard Wensley Bond* was tenant for life under t settlement, and there was a covenant from the settlor, for t enjoyment free from incumbrances. The estate con- ed liable to the judgment; but the settlor's assets were e to exonerate it from the burden. *Richard Wensley d* was the settlor's executor, and wasted more than suf- nt assets to pay the judgment. The decree directs the ment creditor to be paid out of the remaining personal ts: this was of course; but this payment would enure he benefit of the defaulting executor, who ought to e paid off the charge. It is a plain equity against , that the persons whose fund is applied to the payment his demand should be recouped out of his life estate. he made a security to *James Wensley Bond*, which, it id, constitutes him a purchaser. This was in 1836. des the notice from the *lis pendens*, it is apparent from leed of security, that *James W. Bond* knew that *Richard*

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) Colles, P. C. 229.

(b) 2 S. & St. 227

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W. Bond was executor of his father. Now this security was not, like the mortgage in *Walker v. Flamstead*, a step which must be considered as taken in execution of the trust; but it was a charge for an old debt, and an additional loan to *Richard W. Bond* as owner of the life estate, and it transferred no estate to him. I think, therefore, that it is not protected by the authority of that case. *James W. Bond* says he had no notice of the judgment; but it bound the land although he had not notice; and as he came in *pendente lite*, he is bound by the same equity as the person under whom he claims. But then it is said that his deed is registered: to which I answer, that this is not a conflict between two deeds, one registered and the other not; but a claim to be relieved from the effect of the suit depending. The deed, in this case, would have been equally operative without registry, and derives no additional force from it. Lastly, the 7 & 8 of the Queen, c. 90, s. 10, was relied upon; but this case does not, I think, fall within that provision: for on the 1st of November, 1844, *James W. Bond* had express notice of the judgment; and this is not a case intended to be provided for by the Act. It appears to me, therefore, that this defence cannot prevail.

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SMITH v. DOOLAN.

BY settlement of the 9th of January, 1826, executed on the marriage of *Robert Smith* with *Priscilla Doolan*, reciting the intended marriage, and that *Robert Smith* had agreed to hand over to *W. Smith* and *A. P. Doolan*, parties hereto, the sum of 500*l.*, upon the trusts thereafter expressed; and that *W. Smith* and *A. P. Doolan* had agreed to hand over such interest as they should receive for the 500*l.*, until the same should be disposed of as after-mentioned, and to receive and hold such sums of money or other property which *Priscilla Doolan* might thereafter become entitled to on the death of her father, upon the trusts after mentioned: it was witnessed that, in performance of said agreement, and for making a jointure for *Priscilla Doolan* in case she should survive her intended husband, *Robert Smith* assigned to *W. Smith* and *A. P. Doolan* the sum of 500*l.*, as likewise the said legacy or portion, by the consent of *Priscilla*, to be disposed of as after-mentioned; to hold the same, with the rents, issues and profits, and interest thereof, unto *W. Smith* and *A. P. Doolan*, their heirs, executors, &c., in trust for *Robert Smith* and his heirs until marriage: and, after the solemnization thereof, upon trust that they, their executors, &c., should, as soon as conveniently might be, and with the consent in writing of *Robert Smith* and *Priscilla Doolan*, lay out the 500*l.*, and such bequest or legacy as *Priscilla* might thereafter become entitled to, in

November 27.

A sum of money, the property of the intended husband, was vested in trustees, upon trust, during the joint lives of husband and wife, to pay the interest to the husband; and, after his decease, to permit the wife, during her life, to receive same; subject, however, to the control and limitations as the husband should by will appoint amongst the issue of the marriage living or likely to come forth: and in default of such issue, or of such will, to the wife for her life; and after her decease, as she should appoint amongst such of the issue as should be then living; and, in default of appointment, equally: and if no issue living at the death of the wife, over. The wife died, leaving the husband and seven

al issue of the marriage her surviving.

The husband is not, in the events which happened, entitled to the trust fund for his own benefit:

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the purchase of land; and when such purchase should be effected, that the trustees, their executors, &c., should, during so many years as *Robert Smith* and *Priscilla Doolan* might jointly live, pay the rents of said lands, or the interest of the 500*l.* until such purchase should be so effected, as likewise the interest of said bequest or legacy (if in money), or, if in property, the rents thereof, unto *Robert Smith*; but in nowise same, or said principal sum of 500*l.*, or said bequest as aforesaid, to be subject to his debts or engagements; but, on the contrary, if he should at any time thereafter (the said intended marriage taking place) contract any debt which he himself, in the way of business, should not be fully adequate to discharge, or should at any time commit an act of bankruptcy or insolvency, then *W. Smith* and *A. P. Doolan* were not only to retain and keep said several sums and the interest thereof from *Robert Smith*, but to be at liberty to pay over said interest or the rents of said premises unto *Priscilla Doolan*, or unto such person as she should alone, notwithstanding her coverture, by writing, from time to time, appoint,—her receipt to be a sufficient discharge,—to the intent that same might not be subject to the control or debts of *Robert Smith* during his lifetime: and, after his decease, upon trust to permit and suffer *Priscilla*, during her lifetime, to receive and take the said interest, or rents of the lands so intended to be purchased, to her own sole and separate use, subject, however, to the control and limitations as *Robert Smith* should by his last will and testament direct, limit and appoint amongst the issue male or female of the intended marriage, living or likely to come forth: and in default of such issue by said intended marriage, or of such will by *Robert Smith*, then said property, principal, interest, rents and profits, as the case might be, to go to and become the sole property of *Priscilla* during her natural life; and

after her death to be divided in such shares and proportions as she should by will direct and appoint amongst such issue of the intended marriage as should be then living ; and, for want of such appointment, then share and share alike between such issue ; and if only one, then to such one : but if it should so happen that there should be no issue of the intended marriage living at the time of the death of *Priscilla* (she surviving the said *Robert*), then said property, principal and interest, and every part thereof (except such fortune or bequest as she might thereafter become entitled to under the will of her father as aforesaid), to go to and become the sole property of *John Smith* and *William Smith*, the two infant sons of *Robert Smith* by a former marriage, share and share alike : and as to the fortune or bequest which *Priscilla* considered she might thereafter become entitled to, she was thereby at liberty, in case there should be no issue living (she surviving *Robert*) at the time of her decease, to dispose of as she should by will appoint ; and, for want of such appointment, then to the said two sons of *Robert* by such former marriage, as before-mentioned respecting the sum of 500*l.* and the interest and proceeds thereof.

The sum of 500*l.* was not invested in the purchase of land. In May, 1838, *Priscilla Smith* died, leaving her husband *Robert* and several children, sons and daughters, her surviving.

Thomas Doolan, the father of *Priscilla*, died in 1840, without having made any provision for, or bequeathed any legacy to his daughter.

. The bill was filed by *Robert Smith*, praying that the

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trusts of the settlement of 1826 might be carried into execution; and that he might be declared entitled, in the events which had happened, to the sum of 500*l.* for his own use.

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The Attorney-General (Mr. *Smith*) and Mr. Sergeant *Warren*, for the plaintiff, insisted that the power of appointment given to the husband was confined to the event specified, viz., the wife surviving her husband.

Mr. *Martley* and Mr. *Shortt*, for the defendants, were not called on to argue the case.

Judgment.

THE LORD CHANCELLOR;—

It has been said that the statement in the deed, that it was executed to provide a jointure for the wife in case she should survive her husband, not expressing anything about a provision for the issue of the marriage, is to control the whole settlement. That argument cannot have any weight, as there is not only provision for the children of this marriage, but also of a former marriage. The settlement is most inaccurately framed: but I see no difficulty in including the children; which, if I can upon a just construction, I am bound to do. The first trust is for the husband during the joint lives of himself and his wife; with a provision for the separate use of his wife, in case of his bankruptcy or insolvency; and after his decease, upon trust for her, during her life, for her own separate use. There was no gift to him for his life: but there was a resulting trust to him for his life; the trust fund was his own, and the interest was not disposed of during his life. Therefore I must treat this as a settlement on the husband, during the joint lives of himself and his wife: then to himself for his

life; and then to the wife for her life. But he intended to reserve power to himself to defeat the life interest of his wife, in favour of his children, which is rather a singular provision; the trust is, to permit her to receive the interest during her life, to her separate use, subject, however, to the control and limitations as the said *Robert Smith* should by his last will and testament direct, limit and appoint, amongst the issue male or female of said intended marriage, as should be then, at the time of his death, living or likely to come forth. So that the life estate of the wife was liable, at the discretion of her husband, to be cut down, if there were issue of the marriage living at the death of the husband; and in default of such issue by the said intended marriage (that is, issue living at his death), or of such will, then the property was to go and become the sole property of the wife during her life; and after her death to be divided, in such shares and proportions as she by her last will and testament should direct and appoint, amongst such issue of such intended marriage as should be then living; and, for want of such appointment, then share and share alike between such issue; and if only one, then to that one. It is, in effect, a settlement to the husband, for the joint lives of himself and his wife; then to the survivor of himself and his wife for life, with a power of appointment to him amongst his children living at his death, so as to cut down the life estate of the wife; and if he make no will, or there be no children living at his death, to his wife for life; and then as she shall appoint amongst her children living at her death. There is great inaccuracy; but I see no contingency beyond that which must exist in every limitation of a succession of life estates, viz., the contingency of one life surviving the other. But then comes a real contingency; "that if there should be no issue of the intended marriage

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living at the time of the death of the wife, she surviving her husband," the property is to go to and become the sole property of *John Smith* and *William Smith*; the two infant sons of *Robert Smith*, the intended husband, by a former marriage. He did not mean to provide for them except on the contingency that she should survive him, and that there should be no issue of the marriage living at her death.

There is no pretence for making the claim; the bill must therefore be dismissed. Let the plaintiff pay the costs of the trustees; but let him have 40*l.* out of the fund in lieu of all costs.

DALY v. DALY.

PERSSE v. DALY.

Nov. 20, 27.

Testator devised lands to the use of *H.* for life, without impeachment of waste; remainder to trustees during his life, to preserve, &c.; remainder, after his decease, to trustees for a

term of 500 years, upon trust to raise portions for his younger children; remainder to his first and other sons in tail male; with several remainders over. By a codicil to his will, the testator revoked any bequest or devise to *H.* by any former will or codicil: and he devised the same lands to *H.* during his life, subject to an annuity which he had by deed charged thereon; remainder to *M.* during his life, to preserve, &c.; remainder to the first and other sons of *H.* in tail; remainder to *M. D.* in fee: and he directed that this codicil should be taken as part of his will.

Semle,—That the devise of the term of 500 years and the trusts thereof are revoked by the codicil.

Where a codicil contains an unbroken set of limitations, not reconcilable with those in the will, and exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will.

Upon a bill to carry a decree into execution, the Court will assume that the law of the decree is correct upon a matter then submitted to the judgment of the Court.

MICHAEL DALY being seised in fee of the lands of Kilcooly and Poliny, in the County of Galway, by his will dated the 20th of September, 1802, devised said lands to *Denis Bowes Daly* and *James Kirwan*, and their heirs, upon the trusts and to and for the uses and purposes following, that is to say: to the use of his son, *Hyacinth Richard Daly*,

for the term of his natural life, without impeachment of waste; and from and after the determination of that estate to the use of *Denis B. Daly* and *James Kirwan*, and their heirs, during the life of *Hyacinth R. Daly*, upon trust to preserve contingent remainders; and from and after the decease of *Hyacinth B. Daly*, or other sooner determination of said estate, to the use of *Malachy Donnellan* and *Malachy Daly*, their executors, &c., for the term of 500 years from thence next ensuing fully to be completed and ended, without impeachment of waste; which term was so limited to them upon the trusts thereafter declared concerning the same, that is to say, in case there should be an eldest or only son, and one or more child or children of the body of *Hyacinth R. Daly* lawfully begotten, or in case of no issue male of the body of *Hyacinth R. Daly*, and that there should be one or more daughter or daughters of the body of *Hyacinth R. Daly* lawfully begotten, then upon trust that the trustees, their executors, &c., by sale or mortgage of the term of 500 years, should raise and levy the sum of 2000*l.* for the portion or portions of such other child or children besides an eldest or only son, or, in case of no issue male of *Hyacinth R. Daly*, for the portion or portions of such daughter or daughters, to be equally divided between them if more than one; but in case such child or children of *Hyacinth R. Daly*, being a daughter or daughters, should marry without the consent of *H. R. Daly* or *Mary Daly*, his wife, or either of them, in writing, for that purpose first had and obtained, then the share or shares of such daughters should go over to his grand-daughters, *Arabella* and *Letitia Daly*, share and share alike: and his will further was, that from and after the determination of the term of 500 years, and subject thereto, the said lands should remain to the use of the first and other sons of *Hyacinth Richard Daly* successively in tail male;

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and in default of such issue male to the use of *Michael Daly*, third son of his son, *Arthur Henry Daly*, for life, without impeachment of waste ; remainder to the use of *Denis B. Daly* and *J. Kirwan* and their heirs, during his life, to preserve, &c. ; remainder to the use of the first and other sons of *Michael Daly* successively in tail male ; remainder to the use of *Arthur Daly*, second son of *Arthur Henry Daly*, for life ; remainder to the same trustees and their heirs during his life, upon trust to preserve, &c. ; remainder to his first and other sons successively in tail male ; remainder to *Henry Daly*, eldest son of *Arthur Henry Daly*, for life ; with like remainders to trustees to preserve, and to his first and other sons in tail male ; remainder to the fourth, fifth, and other sons of *Arthur Henry Daly* successively in tail male ; remainder to his daughter, *Anne Eyre*, and her right heirs for ever. And he empowered the several tenants for life before mentioned, to make leases and to charge the devised lands with jointures, and also (with the exception of *Hyacinth Richard Daly*) with portions for their younger children.

Michael Daly afterwards married *Mary Tully* ; and by articles of the 13th of November, 1807, executed in contemplation of his marriage, he covenanted to charge and incumber all his property, including the before-mentioned lands, with a jointure of 300*l.* per annum, for *Mary Tully*, during her life, in the event of her surviving him. Pursuant to these articles, a settlement, dated the 7th of October, 1808, was executed by the proper parties, whereby *Michael Daly* conveyed the lands of Kilcooly and Poliny to trustees and their heirs for the use of himself for life ; and after his decease to the use that his wife, *Mary*, should receive a jointure of 300*l.* during her life ; and, subject to a term

of one hundred years, thereby vested in trustees to secure the jointure, to the use of *Michael Daly* in fee.

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Michael Daly made two codicils to his will; the first, which bore date the 16th May, 1807, did not relate to the before-mentioned lands; the other, which bore date the 15th of October, 1808, was in these words: "I, *Michael Daly*, do by this codicil to my last will and testament, revoke any bequest or devise to my son, *Hyacinth Daly*, by any former will or codicil: and I devise to my said son, *Hyacinth Daly*, for and during the term of his natural life, subject to the annuity to my wife, *Mary Daly*, otherwise *Tully*, all my lands of Kilcooly and Poliny, in the county of Galway; and in case the said *Hyacinth Daly* shall forfeit or surrender said life estate, then I devise said lands to *Malachy Daly*, of Raford, and his heirs, during the life of said *Hyacinth Daly*, in order to protect the contingent uses from being destroyed; and from and after the death of said *Hyacinth Daly*, then to the first-born son of the said *Hyacinth Daly*, and the heirs of his body; and in default thereof, to the second, third, and every other son of said *Hyacinth*, and the heirs of his body, the eldest to be always preferred; and for default of such heirs, to my grandson, *Michael Daly*, son of my eldest son, *Arthur Henry Daly*, and his heirs and assigns. I direct that this codicil may, with any other codicil executed by me, be taken as annexed to and making part of my last will and testament."

Michael Daly died, leaving *Hyacinth Richard Daly* him surviving. *Hyacinth Richard Daly* afterwards died, leaving *Denis Bowes Daly*, his eldest son, and four younger sons, his only children, him surviving. The bill in *Daly v. Daly* was filed in December, 1828, by the younger chil-

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dren of *Hyacinth Richard Daly*, against *Denis Bowes Daly* and others, to raise the charge of 2000*l.* created in their favour by the will of *Michael Daly*, and for an account of all prior and contemporaneous incumbrances. And the cause having come on to be heard on the 14th of January, 1833, it was ordered, declared and decreed, that the term of 500 years created by the will of *Michael Daly*, bearing date the 20th of September, 1802, was still subsisting, and that said term had priority to the estate limited by the codicil to the will, dated the 15th of October, 1808, to the first and other sons of *Hyacinth Richard Daly*; and that the charge of 2000*l.*, provided by the will for the younger children of *Hyacinth Richard Daly*, should be, and the same was thereby decreed well charged on the lands of Kilcooly and Pollay, comprised in the term of 500 years: and it was referred to the Master to take the necessary accounts.

The Master accordingly reported that the sum of 2418*l.* 9*s.*, sterling, was due on foot of the charge of 2000*l.*, late currency, and that there were no prior or contemporaneous incumbrances: and the cause having come on to be heard upon report and merits, on the 17th of June, 1833, it was ordered and decreed that the sum so reported, with interest on the principal sum of 2000*l.*, was well charged on the lands comprised in the term of 500 years. And it was referred to the Master to inquire and report whether it would be for the benefit of the minor defendant, *Hyacinth Richard Daly*, the second (who, under a settlement executed on the marriage of his father, *Denis Bowes Daly*, was first tenant in tail of the lands), that the fee of the lands comprised in the term should be sold, in lieu of the term of 500 years, for payment of the demands reported; and if he should so find, and in default of payment of the sums reported within the

times therein mentioned, it was ordered that the Master should sell the fee of the lands for payment of the sums reported: but if the Master should find that it was not for the benefit of the minor defendant that the fee should be sold in lieu of the term, then he was directed to sell the term for payment of the sum due on foot of the charge of 2000*l.*

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By indenture of the 23rd of June, 1838, *Richard Gore Daly* and *Honora Elizabeth Daly*, in whom the charge of 2000*l.* was then vested, assigned for valuable consideration the sum of 2418*l.* 9*s.*, so decreed a charge upon the said lands, together with all interest due and thereafter to accrue due on foot of the said charge, and also all such costs and charges as they were then or thereafter might become entitled to under or by virtue of the decree, to *Burton Persse*, his executors, &c., for his and their own use and benefit.

The bill in *Persse v. Daly* was filed on the 13th of April, 1843, by *Burton Persse*, against *Denis Bowes Daly* and others, praying that the decree of the 17th of June, 1833, in the cause of *Daly v. Daly*, might be carried into execution; and that the plaintiff might be at liberty to prosecute the same, so far, at least, as might be necessary to ascertain what was due to him for principal, interest and costs on the charge of 2000*l.*, and to effect a sale of the lands comprised in the term of 500 years; and out of the produce of such sale to secure payment of his demand.

Denis Bowes Daly and *Julia*, his wife, submitted to the consideration of the Court, whether the proceedings and decrees in the cause of *Daly v. Daly* were valid and binding on them; and insisted that the will of *Michael Daly* was revoked by the subsequent settlement executed upon

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his marriage ; or if not, and that the codicil of 1808 was a republication of the will, yet the term of 500 years thereby created, and the trusts thereof, were revoked by the codicil of October, 1808.

Argument.

Mr. Sergeant *Warren* for the plaintiff.

The Court cannot, upon a bill to carry a decree into execution, review the decree. It may under circumstances refuse to enforce a plainly erroneous decree ; or it may rectify a mere mistake or slip in the former decree ; but it will not examine into the law of it : *Mitf. Tr. Pl. 96* ; *O'Connell v. M'Namara*(a) ; *Hamilton v. Haughton*(b). If so, then the question as to the validity of the charge of 2000*l.* does not arise in this suit. The only question which can be raised is, whether the Court will sell the fee instead of the term, upon a report of the Master that it would be for the benefit of the minor defendant to do so. The present bill does not ask to carry that part of the decree into execution. It is now settled that the Court has not jurisdiction to sell the minor's inheritance upon the supposition that it would be more beneficial for him to do so than to sell the term merely.

THE LORD CHANCELLOR.—I have no power to sell the inheritance of the minor upon the report of the Master. It can only be done by obtaining an Act of Parliament for the purpose.

Mr. *Brooke* for the defendants.

Hamilton v. Haughton is an authority that, if the decree

(a) 3 Dru. & War. 411.

(b) 2 Bli. P. C. 169.

be erroneous, the Court will not carry it into execution. The language of Lord *Eldon* and Lord *Redesdale* is express upon the subject. In *O'Connell v. M'Namara* your Lordship acted on the same principle. We are ready to rehear the cause if necessary.

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Argument.

THE LORD CHANCELLOR:—

I will not take upon myself to review, in this manner, the liberate decision of my predecessor. What I said in *O'Connell v. M'Namara*, though it appears to be general, must be taken *secundum subjectam materiam*. In this case, a point of law arose upon the construction of certain instruments stated upon the pleadings. None of the parties were ignorant of it; the objection was taken by the answer, and the Judge decided against it. Until that decree be reversed upon appeal or otherwise, I must assume that it is correct. There has been no surprise in the matter; it is the deliberate judgment of the Court. I will, however, give you leave to present a petition to rehear the original cause; and let this cause stand over in the mean time.

Judgment.

A petition for a rehearing was accordingly presented.

Mr. *Brooke* and Mr. *P. Blake*, for the defendants, cited *Phillips v. Allen*(a); *Murray v. Johnston*(b); *Ravens v. Taylor*(c).

Argument.

Mr. Sergeant *Warren*, Mr. *Monahan* and Mr. *Vance* for *Dudley Persse*, cited *Jackson v. Hurlock*(d); *Coward v. Marshall*(e); *Beckett v. Harden*(f); *Duffield v. Duf-*

(a) 7 Sim. 446.

(d) 2 Eden, 263.

(b) 3 Dru. & War. 143.

(e) Cro. Eliz. 721.

(c) 4 Beav. 425.

(f) 4 M. & S. 1.

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 {
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Weld v. Acton(d); *Gore v. Gore(e)*.

Judgment. THE LORD CHANCELLOR:—

If I were not pressed by the authority of Lord *Plunket*, I should have no difficulty in deciding this case. By the will of *Michael Daly*, the estates in question, with others, were devised to the use of his son, *Hyacinth*, for life; with remainder to trustees during his life, to preserve contingent remainders; with remainder to two trustees for a term of 500 years, to raise portions for younger children; and then to the first and other sons of *Hyacinth* in tail male: and after these limitations there were devises over to other sons of the testator for life, with remainders over to their issue in strict settlement. After the testator had made his will, he married a second wife, and executed a settlement, whereby he charged the lands with a jointure for his wife; but the form of the deed creating that charge was such that it operated in itself as a total revocation of the will. In this state of things the testator made the second codicil to his will. It is not disputed that the codicil, having been executed according to the Statute of Frauds, might have set up the will so revoked; and it is said that there are in it words sufficient for that purpose. I will assume that to be so. The testator begins by stating it to be a codicil to his last will; and he thereby revokes any bequest or devise to his son, *Hyacinth Daly*, by any former will or codicil; therefore he revokes the life estate given to him by the will. I

(a) 3 Bli. N. S. 261.

(b) 1 Dru. & War. 638.

(c) 8 Bing. 475.

(d) 2 Eq. Ca. Abr. 777.

(e) 2 P. Wms. 28.

have heard much criticism upon the confined nature of the revocation. He treated, it is said, his will and the devises in it, as if they were at that moment operative; and I have no doubt that he was under the impression that the devises were operative, subject only to the jointure. It is further said, that he only revoked the limitation to his son for his life, but not the term of 500 years; and cases have been cited with the view of establishing that proposition: but I am not aware of any authority which would bear out the decree made in this case. In *Duffield v. Duffield*(a) the decision was perfectly correct, and reconcilable with the rule on the subject. *Beckett v. Harden*(b) was the case of a devise of lands to a man and his heirs, to the use that another should receive thereout an annuity for his life, and, subject thereto, to the use of the devisee in fee. By a codicil the testator revoked the devise to the devisee of the fee, and gave the estate to another; and it was held that the gift of the annuity was not revoked: for the annuity was a substantive gift, and the codicil was no more than giving to A. what the testator had before given to B., viz., the estate subject to the annuity. In that case there were two distinct devises, one of the annuity, and the other of the estate subject to the annuity; and the decision was, that the gift of the estate to another person did not revoke the previous independent devise of the annuity: that case, therefore, does not touch the present. The most difficult case on the subject is *Doe v. Hicks*(c): but in it there was an opening for the construction given to the will; for the testator said he revoked *several* of the dispositions made by his will and codicils, (not stating which of them in particular he revoked), and instead thereof made a new disposition of his estates; and

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(a) 3 Bli. N. S. 261.

(c) 8 Bing. 475.

(b) 4 M. & S. 1.

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the Court was required to say what, on the construction of the will and codicils, was his intention, and what were the particular devises which he intended to revoke. That case gave me some trouble as Counsel, but affords me no assistance now; nor is this a case in which I can rely on decisions, in which, from the testator's declaration that he meant to deal with the *estate*, and that word being understood to mean the fee, he was considered as revoking all the limitations carved out of that estate; for all that the testator revokes in terms is the devise to his son. But I must look at the subsequent dispositions in the codicil, and see whether they exhaust the whole fee. If they do, must I not consider that, when the testator revoked the devise to his son, he considered him as representing the whole line of limitations in his will, which followed the devise to him for his life? If I find an unbroken set of limitations, not reconcilable with those in the will and exhausting the fee, I must consider that the testator intended to dispose of the whole fee, which he had otherwise disposed of by his will. Is there anything on the face of the codicil to let in the term of 500 years? He gives to his son, *Hyacinth* (a new gift), the lands, for his life, omitting the clause inserted in his will, that he should be unimpeachable of waste, and making his life estate subject to the annuity to his wife, to which it was not subject by the will; and then he limits the estate to a trustee to preserve contingent remainders; and it is not an unimportant circumstance that this trustee is not either of the two persons who were made trustees for the same purpose in the will. It is an indication of an intention to introduce a new line of limitations. He then gives the estates in tail general, instead of in tail male, to the sons of *Hyacinth Daly*; and, instead of several limitations over in strict settlement, he makes but one limitation over in fee.

What better right have I to introduce the term of 500 years than to introduce limitations over to the other sons of the testator, as in the will? It is equally proper to provide for all these persons. This is a subject which I have often had occasion to consider, and I cannot say that I entertain any doubt upon the point; but I have so much respect for the decision of my predecessor, that, if the parties desire it, I will send a case to a Court of law.

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 ———
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 v.
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 ———
Judgment.

At the request of the plaintiff, a case was sent to the Court of Queen's Bench.

ANGELL v. BRYAN.

THE bill was filed by the plaintiff, as assignee of a judgment obtained against *Thomas Bryan*, deceased, for an account of his real and personal estate and payment thereof. The freehold property of the testator consisted of a leasehold for lives renewable for ever, subject to the payment of a yearly rent and renewal fines. *Jane Bryan*, the devisee of *Thomas Bryan*, suffered an arrear of the rent to become due; and proceedings by ejectment were taken against her to enforce its payment. Under these circumstances, *Charles French* advanced her the sum of 425*l.*, to enable her to pay the rent and costs; and by indenture of the 17th of January, 1845, made between *Jane Bryan* of the one part, and *Charles French* of the other part, after reciting that a large arrear of rent having become due out of the premises, and an ejectment for non-payment thereof having been brought to evict the lease, *Charles*

November 27.
 The devisee of a leasehold estate for lives having suffered an arrear of rent to become due, the landlord brought an ejectment. A third person, at the request of the devisee, advanced money for the purpose of paying the rent, and it was applied accordingly, and the devisee mortgaged the lands to secure the repayment of it. The mortgagee is not entitled to priority over the judgment creditors of the devisor.

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French had advanced to *Jane Bryan* a sum of money sufficient to pay said rent and the costs of the ejectment, and that thereout the said rent and costs had been paid ; *Jane Bryan*, in consideration of said sum of 425*l.*, so advanced for the purposes aforesaid, granted and released the demised premises, by way of mortgage, to *Charles French* and his heirs, to secure the repayment thereof, with interest. She also executed her bond collateral with the mortgage ; on which judgment was afterwards entered.

Charles French, being made a party defendant, submitted that as the sum of 425*l.* was advanced by him in order to pay the head rent and costs of the ejectment, and was applied by *Jane Bryan* to that purpose, whereby the original lease was prevented from being evicted, and thus the interest of all persons therein preserved, the said sum was a charge on the demised premises paramount to the plaintiff's judgment and all other charges.

Argument. Mr. Sergeant *Warren* for the plaintiff.

Mr. *W. Brooke* for *Charles French*.

Judgment. THE LORD CHANCELLOR :—

There is no doubt as to the law. I cannot establish in the mortgagee a right against third parties which did not exist in the person under whom he derives. The consequence of establishing such a right would be, that every tenant for life of a leasehold property would be enabled to give priority to his own mortgagees by simply suffering the rent to run in arrear, and then raising money by mortgage for payment of it. There are cases in which the Court

has properly given a salvage creditor priority over all other incumbrancers. I do not disturb those cases, but this is not within them(a).

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v.

BRYAN.

Judgment.

WILSON v. POE.

POE v. BINDON.

GABBETT v. POE.

HAYES v. GABBETT.

THE bill in the third cause was filed by a bond creditor of *John Gabbett* against his real and personal representatives ; and, by a decretal order of the 4th of June, 1832, it was directed that the usual accounts, including an account of what was due for principal, interest and costs, on foot of the plaintiff's demand, should be taken. On the 28th of October, 1834, the Master made his report, finding that *John Gabbett*, deceased, had, in September, 1815, executed his bond to another *John Gabbett* in the penal sum of 1400*l.*, conditioned for the payment of the sum of 700*l.*, late currency ; that in 1819 the obligor died ; that in 1827 the obligee brought an action on the bond against *William Poe*, the administrator of the obligor, and obtained judgment for the sum of 2692*l.* 6*s.* 1*d.*, and thereupon instituted the present suit. He then reported that there was due on foot of the plaintiff's demand, for principal and interest up to the date of his report, the sum of 1098*l.* 1*s.* 10*d.*, present currency, which was less, by the sum of 194*l.* 4*s.* 4*d.*, than the penalty in the bond. On the 10th of December,

December 2, 6.

The decree having declared that a creditor by judgment upon a bond in a penalty for securing a principal sum, with interest, was entitled to the sum reported to be due to him, together with interest on the principal sum from the date of the report until paid ; the parties to the suit are concluded from denying the right of the creditor to interest beyond the penalty.

(a) See *Brice v. Williams*, Wallis's Reports, 325.

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1834, a final decree was pronounced, which, after reciting the report, decreed that the plaintiff was entitled to the sum reported to be due on the bond and judgment in the pleadings mentioned, "with interest on the principal sum of 700*l.*, in said report mentioned, from the date of said report until paid;" and, in default of payment within six months, a sale of the lands in the usual form.

Some of the lands having been sold and the purchase-money brought into Court, it was, on the 14th of February, 1844, referred to the Master to report the sum due to *Frances Amelia Gabbett*, executrix of *John Gabbett*, the plaintiff in the third cause, for principal, interest and costs; and to allocate the funds in Court in payment of her demand: pursuant to which the Master, on the 12th June, 1845, reported that there was due to her, for principal and interest, on foot of this demand, the sum of 1509*l.* 19*s.* 8*d.*, present currency, which exceeded the amount of the penalty of the bond by the sum of 217*l.* 13*s.* 6*d.* The defendant, *Jane Bindon*, now moved, by way of appeal from the order of the Master of the Rolls, that the report might be varied, by reporting that there was due to the plaintiff, for principal and interest on foot of his demand, the amount of the penalty of the bond, and no more.

Argument.

Mr. *Christian* and Mr. *Ireland* for *Jane Bindon*.

The Master, in making this report, proceeded on the ground that the question as to interest was concluded by the decree, and the Master of the Rolls acted on the same principle. It is a question of construction of the decree. It is a settled rule that a bond creditor is not entitled to interest beyond the penalty, except in certain cases; and

the pleadings and report in this cause show that the plaintiff's demand is not one of the excepted cases. The language of the decree is qualified by the context. It refers to the bond as the foundation and measure of the plaintiff's right. Whenever interest is given beyond the penalty, it is given, not by reason of anything arising out of the bond, but on account of matters wholly *dehors* the bond: *Clarke v. Seton*(a). The words of the decree do not conclude the question. It awards to the plaintiff so much of the penalty as amounts to the principal sum and the interest. In *Gorman v. Arthure*(b) the decree directed an account to be taken of what was due for principal, *interest* and costs on foot of a judgment obtained on a bill of exchange, yet it was held that the plaintiff was not entitled to interest; and in *Mannix v. Drinan*(c) the plaintiff was entitled to two judgments obtained upon bonds in penalties, and by the decree it was referred to the Master to take an account of what was due to the plaintiff on foot of her several demands for principal, *interest* and costs, ascertained to be due by a decree made in a cause of *Williams v. Drinan*; and of the interest which had since accrued due on the principal thereof; yet it was held that, under that decree, the plaintiff was not entitled to interest beyond the penalty. That is a very strong case; for, when the decree was pronounced, the interest exceeded the penalty. In *Pomeroy v. Ponsonby*(d) a judgment creditor was restrained from proceeding in his suit, and directed to prove his demand under the decree; and it was, by the same order, declared that he was entitled to interest on the principal sum secured by his judgment, until paid; neverthe-

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(a) 6 Ves. 411.

(c) 3 Ir. Eq. R. 108.

(b) Ll. & G. temp. Plunk. 235. (d) 6 Ir. Eq. R. 475(π).

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Argument.

less, it was held by Sir *M. O'Loghlen*, M. R., that he was not entitled to interest beyond the penalty.

It is said that the judgment against the administrator is for a much larger sum than the penalty of the bond, and, therefore, the plaintiff is entitled to interest to the extent of the judgment. That arose from the circumstance that the declaration contained two counts on the bond. But, whatever may be the effect of the judgment as between the plaintiff and the administrator, it cannot prejudice the owners of the real estate : *Marten v. Whichelo(a)*.

Mr. Sergeant *Warren* and Mr. *Studdert* for *Frances Amelia Gabbett*.

The question is concluded by the decree. *Gorman v. Arthure* and *Mannix v. Drinan* do not apply ; the question there arose upon decrees to account ; there was nothing declaratory of the right of the judgment creditor, as in the present case. *Pomeroy v. Ponsonby* is very shortly reported ; and it is plain, from the concluding paragraph of the order of the Master of the Rolls, that there must have been some special circumstances in that case.

Judgment.

THE LORD CHANCELLOR :—

In this case the plaintiff was declared entitled to the sum reported due to him, with interest on the principal sum, from the date of the report until paid. The Master was of opinion, and the Master of the Rolls adopted that opinion,

(a) Cr. & P. 257.

that the decree was conclusive upon the question, to what period interest should be calculated? and that, as it did not limit the amount of interest to be recovered to the penalty of the bond, he had no authority to go behind the decree, and confine the interest to that amount. It is plain that this is not error upon the face of the decree; and I have no doubt as to its true construction. I was referred to two cases, which I have looked into; but they do not justify the construction contended for. They were cases where inquiries were directed as to the amount of the sum due to the party; but this is a declaration that the party is entitled to a specific sum, with interest from the date of the report until paid. Parties must take care, in future, to insert proper words into their decrees, limiting the right to recover interest to the amount of the penalty. The order of the Master of the Rolls must be affirmed, but without costs, for I think there has been a slip in this case.

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v.
POE.

Judgment.

SULLIVAN v. SULLIVAN(a).

UPON the former hearing, the plaintiff's jointure was, as against the heir at law of the settlor, declared to be a charge

(a) For the facts of this case see vol. i. p. 678.

November 11.

G. S. being
seised in fee in
possession of
X., and of a re-
mainder in fee,
expectant on
the death of

J., in Z., upon his marriage charged X. and Z. with a jointure; and it was provided, that during the life of J. the jointure should be borne by X.; and that, if J. should die in the life of the wife (which happened), the jointure should issue out of Z., and no part of it out of X. X. was settled on the issue of the marriage; and Z. was limited to G. S. and his heirs. And it was provided, that upon G. S. charging other lands of his with the jointure, the lands of X. and Z. should be discharged therefrom. And G. S. covenanted to charge 3000*l.* for children's portions, and that it should be the first charge on all property of which he should die seised or possessed, and have priority over all other charges thereon.

Held,—1. That, as between the lands of X. and Z., the lands of Z. were bound to indemnify the lands of X. against the jointure.

2. That the 3000*l.* being a charge upon such property only of G. S. as he died seised or possessed of, it became on his decease a charge upon X., and was *puisne* to the jointure.

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v.
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—
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upon the lands of Greenfield and Rathleigh. The younger children of the settlor having been made parties to the suit, pursuant to the leave given by the Court for that purpose, the cause now came on again to be heard. The questions were: first, whether the plaintiff's jointure was a charge upon the lands of Rathleigh; secondly, if it were, whether Greenfield was bound to indemnify Rathleigh against it; and thirdly, whether the portion for the children of the settlor, 3000*l.*, was a charge on Greenfield in priority to the jointure.

Argument. The Solicitor-General (Mr. *Greene*), Mr. *Brooke*, Mr. *Keller* and Mr. *Thomas Jones* for the plaintiff.

Mr. Sergeant *Warren*, Mr. *Herrick* and Mr. *Chatterton* for *Edward Sullivan*.

Mr. *Monahan* and Mr. *Coppinger* for the younger children of *George Sullivan*.

Judgment. THE LORD CHANCELLOR :—

This question arises upon the construction of a very inaccurate settlement, but there is not much difficulty in it, when the frame of the settlement is understood. *George Sullivan*, the settlor, had two estates, one called Greenfield, in which he had a remainder in *quasi fee* after the decease of *Jeremiah Sullivan*, who was entitled to a life estate therein; the other called Rathleigh, of which the settlor was seised in *quasi fee*. The lady had property of her own, which it was agreed should form her provision in the first instance; and if that failed, the deficiency was to be made good out of the estate of her husband. I held upon the former hearing, and, upon reconsideration, I think properly,

that, as against the persons entitled to these two estates, the widow was entitled to her jointure out of both. But then there was a provision that, as Greenfield was settled upon *Jeremiah* for life, the deficiency in the jointure should be borne by Rathleigh during the life of *Jeremiah Sullivan*. That was of necessity; for *George*, the settlor, had no interest in that estate until after the death of *Jeremiah*; and therefore could not properly charge anything but his remainder. Then it was provided, that, if *Jeremiah* should die in the lifetime of the wife, it should issue out of Greenfield, and no part of it out of Rathleigh; or, in other words, that when Greenfield became an available fund to pay the jointure, Rathleigh, of which the settlor was seised in *quasi* fee, and which he intended to settle upon his sons, should be wholly discharged from the jointure. After these provisions there follows a very important provision, which gives to *George Sullivan* the right to secure the jointure upon any other property of his; and he is thereupon to take Greenfield in fee, and Rathleigh is to be wholly discharged from the jointure; which marks strongly the intention. Then Greenfield is settled, "subject to such payment of the jointure as under and according to the true intent and meaning hereof ought to be made thereout," upon *George Sullivan* absolutely; and Rathleigh is settled, "subject to such payment of the jointure as under and according to the terms of these presents ought to be made thereout," upon the first and other sons of the marriage in *quasi* tail. Great reliance has been placed upon those words; but I think they were only used with reference to the incumbrances; first, that the estates were to come in aid of the wife's estate for the payment of her jointure; and secondly, that, as between the estates themselves, there was to be a certain arrangement, according as events might hap-

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pen. Those words amount to nothing more than a declaration that the estates were to be liable in the manner in which they had been made liable by the deed. It has already been decided that the widow is entitled to go against both the estates for her jointure; but the present contention is, whether Rathleigh is entitled to be indemnified by Greenfield. I am clearly of opinion that it has that right. Every part of this settlement contains an indication that, as between the two estates, Rathleigh is to bear no part of the burden, and that Greenfield is to indemnify it. I must therefore declare that, as between those two estates, Greenfield is the primary fund, and bound to indemnify Rathleigh from the annuity; and that Rathleigh is to be held discharged of the jointure.

Another question was raised, as to the rights of the younger children to their portions. After the two estates had been settled in the manner I have mentioned, *George Sullivan* covenanted that he would pay 3000*l.* to the trustees, as portions for his younger children; and, by way of securing them, he charged and made liable all the real and personal estate of which he should die seised and possessed with payment thereof, and declared that these portions should be the first lien or charge upon his property, and in preference to any other incumbrance. It is argued that that gives the 3000*l.* priority, as to Greenfield, over the charge of the annuity, which I have held is a charge upon Greenfield exclusively, as between that estate and Rathleigh. But consider what it was which *George Sullivan* had to dispose of. He had the *quasi* fee in Greenfield, which was the proper fund for securing the widow her rent-charge, but which he might have got back, discharged of the jointure, if he subjected any other property to that charge. It is well settled, that,

notwithstanding a covenant to settle or charge all the property of which the settlor shall die seised, the settlor has during his lifetime uncontrolled power over the whole of his property real and personal ; and, if he do not act fraudulently, he may alter its nature from real to personal, and may sell it and die without assets, provided he *bona fide* disposes of the property as against himself. This covenant would therefore only bind the property of which *George Sullivan* died seised ; and Greenfield, in that respect, stood in the same relation to the covenant as any other property. Supposing he had sold Greenfield and bought Blackacre, of which he had died seised, it would have been liable, and Greenfield discharged. It is therefore clear that, notwithstanding the words of this settlement, as Greenfield was not charged with the 3000*l.* unless *George Sullivan* died seised of it, any incumbrance charged upon it by act *inter vivos* would take precedence over it. The property having been charged by the settlement with the annuity, *George Sullivan* had at the time of his death, nothing in the lands which could be charged with the 3000*l.*, except the fee-simple, subject to the annuity.

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Judgment.

It is to be observed that the son, who was entitled to Rathleigh, might himself become entitled to the 3000*l.* charge, which affords some evidence of the intention. There is also a general power of leasing Greenfield given to *George Sullivan*, without any other restriction than the consent of *Jeremiah Sullivan* during his life ; but nevertheless it is made subject to the annuity for his wife, supposing the estate not to have been reconveyed to him. That shows that, if Greenfield was not reconveyed to *George Sullivan*, his power of disposition over it, large as it was, was still to be subject to the annuity. The case,

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v.

SULLIVAN.

Judgment.

although somewhat complicated, is, I think, free from doubt.

I shall declare that, as between the two estates, Greenfield is the primary and South Rathleigh the secondary fund for payment of the annuity; and that the annuity is the prior, and the 3000*l.* the *puise* charge on Greenfield.

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1. If a father, having a power to appoint to a child, without making an actual appointment, concur with the child in making a settlement which cannot have effect unless through a previous appointment, that very disposition is considered, first, as an appointment to the child, and then as a settlement by the child of the property appointed; but if the intention of the parties be, not to execute the power of appointment, but to operate on the estates in default of appointment, and if the transaction considered as an appointment would be a fraud on the power, the Court will not imply an appointment, none such having been actually made. *Thompson v. Simpson.* 110
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A., being seised in fee of Ardgullen, confessed a judgment, and afterwards upon the marriage of his son *B.*, conveyed the lands to the use of *B.* for his life, remainder to the issue of the marriage; and covenanted that they were free from incumbrances. By his will he gave

several legacies, and died, having appointed *B.* his executor, and leaving assets more than sufficient to pay all his debts and legacies. Upon the marriage of *C.*, one of the legatees, a settlement was executed, whereby, after reciting the will of *A.*, and that the legacy of *C.* was then in the hands of *B.* as executor, *C.* assigned the legacy to trustees, of whom *B.* was one, upon trust for *C.* for her life, and, after her decease without issue, upon trust for the benefit of the judgment creditor and his issue.

In 1835 the judgment creditor instituted a suit for payment of his judgment out of the real and personal assets of the testator. In 1836, *C.* and her husband (there being no issue of their marriage) instituted another suit against *B.*, and the persons entitled under their settlement in default of issue of their marriage, for the appointment of new trustees, and an account of the trust funds; and in that suit an order was made on the consent of *B.*, but without notice to the persons entitled in default of issue of *C.* and her husband, that *B.* should transfer to the credit of that cause, stock to the value of *C.*'s legacy, without prejudice to the rights of the parties; and it was ordered that the dividends thereof be paid to *C.* The stock was accordingly transferred by *B.*, who purchased same with the produce of the sale of part of the assets of

the testator, which were outstanding in specie when the bill of 1835 was filed. The assets having been wasted, the children of *B.*, claiming as specialty creditors of *A.* under his covenant, filed a bill in 1840, to have the stock standing to the credit of *C.'s* cause applied in payment of the judgment debt:—*Held*, that the stock had not been appropriated to the payment of *C.'s* legacy, either as against the specialty creditors or the other legatees of *A.*, but that it still continued assets for payment of his debts and legacies. *Jennings v. Bond.* 720

ARBITRATION.

Two persons, equally entitled to certain unenclosed slobbs, agreed to allot certain parts thereof to each of them, in severalty; and to refer it to arbitrators to award what portions of the unallotted slobbs should be allotted to each of them for owelty of partition:—*Held*, that the insufficiency of the unallotted slobbs to compensate one of the parties for the deficiency of his part of the allotted lands, arising from a matter which occurred subsequently to the arrangement between them, but which was in their contemplation at the time, did not give him an equity to have compensation out of the lands allotted to the other party.

An agreement to refer, and arbitrators named, and a covenant not to sue, and a power to examine witnesses upon oath, and to make

the submission a rule of Court, prevent a party from filing a bill with a view of withdrawing the case from the arbitrators.

A party to a suit cannot set up an objection which grew out of his own conduct.

Two arbitrators were named in a submission to refer, and they, or other the persons appointed in their place, were, before they proceeded, to appoint a third arbitrator; any two of the arbitrators for the time being might at any time, or from time to time, make awards or orders, provided the last of such awards should be made before the 1st of July, 1843, or before such other later time as any two of the arbitrators for the time being should appoint: and any two of the arbitrators for the time being might extend the time for making the last award, whether such time should have previously expired or not. And it was provided that *X.* should, as soon as conveniently might be, appoint an umpire; and that if no two of the arbitrators for the time being should be able to agree in making an award or order concerning any matter which ought to be awarded or ordered by them, such matters should be awarded or ordered by the umpire; and if at any time before the several powers, authorities, covenants and provisions, in the deed of submission, were executed, either of the arbitrators named by the parties should refuse to act, the party whose arbitrators so refused

should appoint another in his place; and if he did not do so within fourteen days, then that the third arbitrator, and, if none such, the umpire, should appoint such arbitrator.

The plaintiff's arbitrator refused to act, and nothing was done in the matter of the reference before the first of July, 1843. The plaintiff having after that day refused to appoint an arbitrator, the defendant procured X. to appoint an umpire, who appointed an arbitrator on behalf of the plaintiff, and the two arbitrators appointed a third, and then the time was extended by the three arbitrators:—*Held*, that the time was duly extended. *Dimsdale v. Robertson.* 58

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Lands were limited to a father for life, with a power of appointment amongst his children; and in default of appointment, to the children as tenants in common in fee. The father and the eldest son (there being several children) joined in a fine and recovery of the estates; and being advised that the consequence of their act was to vest the fee in the father alone, he, by lease and release, conveyed the lands to a purchaser, and received the entire amount of the consideration money

for his own benefit; the son being present at the transaction, and assenting to the conveyance. The interest which the son had in the lands at the time of the conveyance, but not that which he subsequently acquired, is bound by his assent to the conveyance to the purchaser. *Thompson v. Simpson.* 110

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should from time to time be due by the partners, to the extent of 1000*l*. Separate judgments were entered against the obligors. The trading firm having become bankrupt:—*Held*, that the banking company might prove against the joint estate for a balance less than 1000*l*., due on foot of an account current.
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3. If a trustee has not misconducted himself, even though the Court punish him, as by making him pay

interest on funds in his hands, yet he shall get the costs of the suit; but if his account be greatly reduced in the office, he shall not get the costs of passing it. *Fozier v. Andrews*. 199

4. A decree for the delivery of the possession of lands and title-deeds, and payment of money, was made, with costs to be paid by the defendants. One of them having performed all that he was directed by the decree to do except paying the costs, died before the costs were taxed: — *Held*, that there could be no revivor for the costs.

The general rule is, that there can be no revivor for untaxed costs; and whether the abatement is caused by the death of the party to pay or the party to receive the costs is immaterial. *Bowyer v. Beamish*.

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the costs occasioned by dealings with the charge should be borne by the charge and not by the estate. *Stewart v. Marquis of Donegal*, 636

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1. A lease was made for three lives, and the survivor of them, and for the lives and life of such other person and persons as should be nominated by the lessee, his heirs and assigns, upon the death of any of the persons for whose lives the premises were granted, or upon the death of any such person or persons as should at any time thereafter be nominated, for ever, according to the covenants and agreements for that purpose thereafter contained. The lease did not contain an express covenant by the lessor to renew; but the lessee covenanted within six months after the decease of each of the *cestui que vies* therein, and of each person who should thereafter be nominated, to pay, in the nature of a fine, for each person so dying, to the lessor and his heirs, a peppercorn, if demanded; and powers of distress and entry, in case the fine should be in arrear, were reserved to the lessor and his heirs: and the lessor covenanted that the lessee and his heirs, paying the rent and fines, might quietly enjoy according to the true intent and meaning of the indenture:—*Held*, that this was a lease for lives renewable for ever. *Chambers v. Gaussen*, 99

2. A sum of 7500*l.* Bank Stock was vested in trustees, upon trust, out of the proceeds thereof, to pay an annuity of 561*l.* to *F.* for life; and to invest the residue in Bank Stock, or Government security: and upon trust that, after the decease of *F.*, the 7500*l.* Bank Stock, and the savings of the dividends or proceeds thereof, be divided into five equal shares, a share to be transferred to each of the five persons therein named. One-fifth of the 7500*l.* Bank Stock was, upon the marriage of one of the parties entitled to the *corpus* of the trust-fund, in the lifetime of the annuitant, made the subject of settlement:—*Held*, upon the intention of the parties, to be gathered from the nature of the instrument, and upon its construction, that one-fifth of the accretions by way of bonus subsequently added to the original capital sum, and also one-fifth of the surplus dividends, were subject to the trusts of the settlement. *Plunkett v. Mansfield*. 344
3. Another of the persons entitled to one-fifth of the *corpus* of the trust-fund, by indenture, reciting that he was entitled, after the decease of the annuitant, to one-fifth of the sum of 7500*l.* Bank Stock, in consideration of the sum of 500*l.*, sold and assigned 750*l.*, or one-half of the sum of 1500*l.* Bank Stock, and all his estate and reversionary interest therein:—*Held*, that the purchaser was not entitled to the accretions by way of bonus, which had been afterwards declared on the 7500*l.* stock, or to the surplus dividends thereof. *Plunkett v. Mansfield*. 344
4. A money-fund was vested in trustees, upon trust to permit the intended wife, during the joint lives of herself and her intended husband, to take the interest thereof for her separate use; and after the decease of the husband, in trust for the wife and her assigns during her life, in case she should survive him; and after the decease of the wife, as to one moiety of the property, upon trust for the sole and absolute use of the wife, to be disposed of by her in such manner as she might, by deed or will, notwithstanding her coverture, appoint; and in default of any such appointment upon trust as therein mentioned. The wife cannot, during the coverture, make an absolute disposition of the moiety of the trust-fund. *Nixon v. Nixon*. 416
5. *E.* being entitled to an annuity of 480*l.* issuing out of the lands of *X.*, of which her son *A.* was seised in fee, on her marriage, in 1801, with *W.*, executed a settlement, whereby, after reciting that the clear annual rents of *X.* did not, upon an average, exceed the sum of 240*l.*, and were, therefore, insufficient to answer the accruing payments of the annuity, she assigned the annuity, and all arrears and future payments thereof, to trustees, upon trust, that if *A.* should attain the age of 21, the trustees should thenceforth,

during the joint lives of *E.* and *A.*, thereout pay him a certain annuity; with a proviso for its cesser or abatement, in case *A.* should become entitled to an annual income of equal or lesser amount: and, subject thereto, to receive so much and such part of the annuity of 480*l.* as the clear yearly rents of *X.* should, from time to time, be sufficient to pay; and pay the same to *W.*, and to *E.* after the death of *W.*: and to stand possessed of the arrears then due, and thereafter to become due, of the annuity, in consequence of the rents of *X.* being insufficient to answer same, upon trust, if *A.* should attain 21, or marry, and survive *E.*, to release the lands from the arrears due at the time of the settlement, or thereafter to become due: and if *A.* should either die in the lifetime of *E.*, or should survive *E.*, and die under 21 and without having been married, to stand possessed of the arrears upon such trusts as *E.* should appoint; and, in default of appointment, to call in and enforce payment thereof, and invest same, and pay the interest thereof to *E.* for life, then to *W.* for his life; and then the principal to the children of *E.* and *W.*, equally: and it was declared, that in the mean time, and until, under the trusts, the arrears should either become absolutely vested in *A.*, or become absolutely subject to the appointment of *E.*, the trustees should forbear from requiring or enforcing

payment of the arrears. *A.* attained the age of twenty-one years: *W.* died. Afterwards the rents of *X.* amounted to more than 480*l.* per annum:—*Held, E.* and *A.* being both living, that the surplus rents, after paying the accruing gales of the annuity, were properly applicable to the payment of the arrears which accrued since the settlement of 1801. *Battersby v. Rochfort.* 431

6. Testator devised lands to *P.*, upon trust to convey them to his three sons, in such shares as *P.* should appoint; and in default of appointment he gave the lands to them equally as tenants in common. In 1786, *P.*, in execution of the trust, conveyed part of the lands to the use, that in case *S.* (one of the sons) should marry with the consent of *P.* first obtained, but not otherwise, such woman or women as he should so marry, in case she should survive him, should, during her life, receive for jointure such annuity (not exceeding a certain sum) as *S.* should appoint; and to the further use, in case *S.* should marry with such consent, but not otherwise, that he might, by deed or will, charge the lands with 500*l.*, for portions for his younger children, payable in such shares as he should appoint. In 1788 *S.* married with consent; and, reciting his power, covenanted that the trustees of his settlement, in case there should be one or more younger children of the marriage living at his death, should raise 500*l.* out of the lands;

said sum to be divided in such shares and proportions, amongst such younger children, as he should by will appoint; and for want of appointment, equally. There was issue of this marriage three younger children. *S.*, after the death of *P.*, married a second wife, and charged the lands with an annuity for her jointure; and died, leaving his wife and four children of his second marriage, and three younger children of his first marriage, surviving. By his will, in 1842, he appointed one shilling to each of the children of the first marriage, and the residue among the children of the second marriage:—*Held*, upon the construction of the settlement of 1786, and the circumstances, that the consent of *P.* was only requisite to any marriage of *S.* which should take place in his lifetime; and that the children of the second marriage were objects of the power. *Green v. Green.* 529

7. That the settlement of 1788 amounted to a contract, that, so far as *S.* could bind his power, the children of the first marriage should take the fund equally between them, if he did not otherwise apportion it amongst them; and that upon there being issue of the second marriage, *S.*'s power of appointment was gone; and that the children of both marriages were entitled to the fund equally between them, as one class. *Ibid.*

8. *S.*, entitled to a lease for lives, by lease and release of the 5th of

March, 1833, in consideration of love and affection for his eldest son, *J.*, "and in order to advance him in life, and to entitle him to a wife and fortune now in contemplation," conveyed the lands to *J.* and his heirs. This deed was executed by *S.* and *J.*, and was registered by *S.* nine months afterwards; but *S.* retained it in his possession, and, with the assent of the son, continued to his death to act as the owner of the lands. *S.*, by his will, devised all such real, freehold, and personal property, of which he should die seised or possessed, to *J.*, "in case he shall recover from his present illness;" and appointed *E.* his residuary legatee. There was no particular marriage in contemplation when the conveyance of 1833 was executed. *J.* survived the testator, and afterwards died of the illness with which he was afflicted when the testator made his will.

Held,—1. that the conveyance of 1833 was not conditional, executed for a specific purpose which had not been performed; and that on its execution the legal estate was vested in *J.* 2. That the estate was not divested by the son not afterwards marrying. 3. That the circumstances of the case did not establish a trust for *S.*

Semble,—that the true construction of the devise to *J.* is, that it is a gift to him, in case he did not die from his then present illness in the lifetime of the testator. *Alleyne v. Alleyne.* 544

9. *B.*, in consideration of 2275*l.*, assigned an annuity upon her own life, charged upon the estates of *X.*, to *A.*; and covenanted for the payment of it. The deed contained a clause empowering *B.* to determine and revoke the assignment upon repayment of the principal sum of 2275*l.*, and discharge of all arrears of the annuity, "and all proportion of such annual and increased premiums as aftermentioned to be paid by *A.* to the Hope Assurance Company, if any shall be so paid;" provided that whereas *A.* had assured, or agreed to assure, the life of *B.* for the sum of 2275*l.*, the annual premium for which was payable in advance at the beginning of each year, it was agreed that, if such abovementioned redemption should take place at any time after the premium should have been paid for the then current year, then *B.* would repay to *A.*, at the time of such redemption, the full proportion of such premium which should belong to such part of the current year as should be then unexpired, whether *B.* should require the policy of insurance to be assigned to her or not. And *B.* covenanted to repay *A.* all extraordinary expenses of insurance occasioned by her going beyond Europe. *A.* effected a policy of insurance on the life of *B.* for 2275*l.*:—*Held*, that *B.* was entitled, upon repurchase of the annuity, to an assignment of the policy. *Williams v. Atkyns.* 603

10. A sum of money, the property of

the intended husband, was vested in trustees, upon trust, during the joint lives of husband and wife, to pay the interest to the husband; and after his decease to permit the wife, during her life, to receive same; subject, however, to the control and limitations as the husband should by will appoint amongst the issue of the marriage living, or likely to come forth; and in default of such issue, or of such will, to the wife for her life; and, after her decease, as she should appoint amongst such of the issue as should be then living; and in default of appointment, equally; and if no issue living at the death of the wife, over. The wife died, leaving the husband and several issue of the marriage her surviving. The husband is not, in the events which happened, entitled to the trust-fund for his own use. *Smith v. Doolan.* 747

11. *G. S.* being seised in fee in possession of *X.*, and of a remainder in fee, expectant on the death of *J.*, in *Z.*, upon his marriage charged *X.* and *Z.* with a jointure; and it was provided, that during the life of *J.* the jointure should be borne by *X.*; and that, if *J.* should die in the lifetime of the wife (which happened), the jointure should issue out of *Z.*, and no part of it out of *X.* *X.* was settled on the issue of the marriage, and *Z.* was limited to *G. S.* and his heirs. And it was provided, that upon *G. S.* charging other lands of his with the jointure, the lands of *X.* and *Z.* should be discharged

therefrom. And *G. S.* covenanted to charge 3000*l.* for children's portions, and that it should be the first charge on all property of which he should die seised or possessed, and have priority over all other charges thereon:—*Held*, 1. That, as between the lands of *X.* and *Z.*, the lands of *Z.* were bound to indemnify the lands of *X.* against the jointure. 2. That the 3000*l.* being a charge upon such property only of *G. S.* as he died seised or possessed of, it became on his decease a charge upon *Z.*, and was *puise* to the jointure. *Sullivan v. Sullivan.* 769

DEVISAVIT VEL NON.

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The acts of a party to a particular instrument are properly to be taken into consideration of the question, whether it was executed during a lucid interval. *Creagh v. Blood.* 509

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1. To a bill to raise a demand out of property vested in trustees for the separate use of a *feme covert*, the trustees ought to be made answering parties. *Peppard v. Kelly*. 558
2. "The costs occasioned thereby," in the 18th General Order of 1843, are the costs occasioned by the defendant entering an appearance in common form, and not merely the costs occasioned by his answer. *Peyton v. Browne*. 560
3. The grantor of a rent-charge was discharged as an insolvent, but still continued in possession of the lands: —*Held*, that the assignee of the insolvent ought to be made an answering party to a bill by the grantee, to raise the arrears by means of a receiver. *Curtin v. Darcy*. 718

GUARDIAN.

Two out of three testamentary guardians declined to accept the trust. They are not entitled, as of right, after the death of their co-guardian, to be appointed guardians by the Court. But said testamentary guar-

dians (other circumstances being equal) will be preferred to the person nominated in the will of the mother (the third guardian) to be guardian of the infants after her decease. *In re Johnstons*. 222

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TRUSTEE, 1.

INJUNCTION.

By the 29 Geo. III. c. 57. s. 1, the Crown was authorized to grant letters patent for establishing and keeping a theatre in Dublin; and by section 2 it was enacted, that no person should for hire, act any play in any theatre in Dublin, except in such theatre as should be so established by letters patent, under the penalty of forfeiting 300*l.* for every such offence, to be sued for by the common informer. Under this statute the Crown granted letters patent to *H.*, authorizing him, during a certain term, to keep a theatre in Dublin; and His Majesty prohibited and forbid all persons whatsoever, during the term, that they presume to keep open, in any manner, any theatre in Dublin, and therein to act any play, unless they should be thereunto authorized by His Majesty:—*Held*, that the patentee could not maintain a bill for an injunction to restrain unauthorized persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted. *Calcraft v. West.* 123

Such a bill can only be maintained on the ground of interest in the plaintiff; and unless he can sustain an action on the case, the injunction cannot be supported. *Calcraft v. West.* 123

INSANITY.

See DEVISAVIT VEL NON.

LUNACY AND LUNATICS.

INSOLVENCY.

See GENERAL ORDERS, 3.

PLEADING, 2.

POWER TO LEASE, 1.

REGISTRY ACT.

TRUSTEE AND CESTUI QUE
TRUST, 1.

INTEREST.

See DECREE.

LIMITATIONS, STATUTES OF, 3.

POWER, 7.

PRINCIPAL AND SURETY.

TENANT FOR LIFE AND REMAIN-
DER-MAN, 2.

WILL, 1.

INTERPLEADER.

John lodged 130*l.* in a bank, in his own name, upon a deposit receipt: afterwards, *Daniel*, by the direction of *John*, lodged an additional sum of 5*l.* in the bank, and obtained a new deposit receipt for 135*l.* in the name of *Catherine*; and the old receipt was cancelled. *John* died; and *Daniel*, as his administrator, claimed the money, alleging that the gift to *Catherine* was incomplete, and that he had taken the

receipt in the name of *Catherine* without the directions of *John*; and he refused to give *Catherine* the deposit receipt, and required the bank to pay him the money. *Catherine* also demanded the money of the bank; which they refused to pay, as she had not the deposit receipt. Both *Catherine* and *Daniel* commenced actions against the bank, who filed a bill of interpleader against them. This is not a case of a double demand for one duty, but it is a case in which there may be two liabilities. The bill was, therefore, dismissed. *Cochrane v. O'Brien.* 380

A mere pretext of a conflicting claim will not support a bill of interpleader: the Court is bound to see that there is a question to be tried. *Ibid.*

ISSUE.

See MARRIAGE ARTICLES, 2.
WILL, 2.

ISSUE UNBORN.

See NOTICE.

JOINT STOCK COMPANY.

See PUBLIC COMPANY.

JOINTURE.

See MARRIAGE ARTICLES, 1.

JUDGMENT.

See BANKRUPTCY.

COSTS, 1.

LIS PENDENS, 1.

PUBLIC COMPANY.

A joint judgment against two cannot be proved under a decree to account in a suit instituted to administer the real assets of the conusor who died first, the surviving conusor not being a party to the suit as such.

The case does not fall within the twenty-eighth General Rule of March, 1843. *Hatchell v. Sutton.* 21

LAGAN NAVIGATION.

See POWER, 5.

LANDLORD AND TENANT.

See LEASE FOR LIVES RENEWABLE, 1, 2.

POWER TO LEASE, 3.

PRINCIPAL AND AGENT, 2.

RECEIVER, 2.

LEASE.

See POWER TO LEASE, 1, 2, 3.
SURRENDER.

LEASE FOR LIVES RENEWABLE.

See DEED, 1.

1. A bill by a landlord against the assignee of his lessee for lives renewable for ever, to compel her, pursuant to a covenant in the lease, to accept a renewal, was dismissed; she having become assignee under circumstances which rendered it inequitable in the landlord to compel her to accept the renewal; and it was dismissed with costs, the Court being of opinion that, inde-

pends of those circumstances, the landlord had, by his *laches*, lost the right to enforce the acceptance of the renewal. *Alder v. Ward*. 571

2. The object of the Tenantry Act (19 & 20 Geo. III. c. 30), and of the local equity of the kingdom, of which it is declaratory, is only the relief of the tenant, not that of the landlord; therefore, where a *cestui que vie* died in 1802, and in 1842 the landlord filed his bill against an assignee of the lessee, to compel her to accept a renewal, the bill was dismissed with costs, though the case was one of mere *laches*. *Ibid*.

LEASE PUR AUTRE VIE.

A lessee of lands demised to him, his heirs and assigns *pur autre vie*, devised all his real, freehold and personal property to his wife and children, share and share alike. One of the children who survived the testator, died intestate:—*Held*, that his heir at law, and not his personal representative, was entitled to his share of the freehold lands. *Wall v. Byrne*. 118

LEGACY.

See APPROPRIATION.

A purchaser of a legacy is but the purchaser of a chose in action, and is subject to the same equities in respect of the legacy, as his vendor, and therefore to refund it if necessary for the payment of debts. *Jennings v. Bond*. 720

LETTING UNDER THE COURT.

See PRACTICE, 2.

LIEN.

See SOLICITOR AND CLIENT, 4.

LIMITATIONS, STATUTES OF.

1. Testator devised lands to trustees and their heirs, upon trust to grant and convey the same to the use of *T. W.* for life, subject nevertheless to, and charged with four annuities, to commence upon the death of *X.*; three of which were to be paid to three different charitable institutions (two of them being corporate bodies), and the fourth to the poor of a parish: and after the death of *T. W.*, subject to the annuities, to the use of his first and other sons in tail: and he directed said several annuities to be paid (not saying by whom) on the days therein mentioned; and expressly charged his estate with the same. *X.* died more than twenty years before the filing of the bill to establish the charitable devises, and no payment or other satisfaction was ever made on foot of the annuities. No conveyance had been executed by the trustees; but *T. W.* had, since the death of the testator, been in possession of the estates; and he and his eldest son suffered a recovery and resettled them:—*Held*, that the right to recover the annuities was not barred by the 3 & 4 Will. IV. c. 27; the trust for the chari-

ties being an express one within the meaning of the twenty-fifth section of that Act.

Charities are, equally with other trusts, within the operation of the 3 & 4 Will. IV. c. 27.

Every charge upon an estate does not create a trust, although it imposes a burden; but it may create a trust depending on the nature of the charge. If the gift is an express one, and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust.

Where a testator gives an estate to one, subject to a charge, the person to pay the charge is the person who is liable to the burden; and this, in the case of a charity, impresses him with the character of trustee for that charity. *Commissioners of Charitable Donations v. Wybrants.* 182

2. *F.* was indebted to *C.* in 800*l.*; to secure which, in 1814, he granted to *C.* an annuity or rent of 100*l.*, to be issuing out of the lands of Dovegrove (held by *F.* under a lease from *C.*); *habendum* until thereby the 800*l.* and interest was paid: and *F.* covenanted to pay the annuity. In 1815 *C.* assigned the sum of 798*l.* (being the money then due on foot of the 800*l.*), and the annuity, to *H.*, and covenanted that the annuity should be regularly paid: and being entitled to a sum of 2000*l.* charged on lands of which he was himself tenant for life, he, as a further security, assigned 800*l.*,

part of the 2000*l.* to a trustee, upon trust, in case the annuity should be unpaid for forty-one days, then, from time to time, to call in and receive such parts of the 2000*l.* as should be sufficient to satisfy the arrears, and apply same in payment thereof; and, after payment thereof, in trust for *C.* In 1816, the annuity was unpaid for more than forty-one days; but payments were made on foot of it, up to October, 1821.

In 1820 *C.* evicted the lands of Dovegrove for non-payment of rent, and died in 1824.

Under a decree to take an account of the incumbrances affecting the lands charged with the 2000*l.*, made in a suit instituted in 1839, the Master reported that the principal money which, in October, 1821, was due on foot of the 798*l.*, to secure which the 800*l.* had been assigned, was still due; and that the residue of the 2000*l.*, after payment of that sum, was due to the personal representative of *C.*

Upon an exception taken by the personal representative of *C.*:—*Held*, that the demand of *H.* was not barred by the 3 & 4 Will. IV. c. 27, s. 40.

The trust created by the deed of 1815 is a continuing trust, not to be executed once for all; and a present right to receive the 800*l.*, within the meaning of the 3 & 4 Will. IV. c. 27, s. 40, did not accrue upon the non-payment of the annuity for forty-one days.

A person entitled to a sum of

money charged upon land, assigned it to trustees, in trust to secure the payment of a debt, and, after payment thereof, in trust for himself. He cannot, as against his creditor, insist that the trust is barred by the Statute of Limitations. *Heenan v. Berry.* 303

3. In a petition matter, a conditional order for the appointment of a receiver to pay the sum of 1506*l.*, "stated to be due to the petitioner," on the judgment, was made absolute; with liberty to the Master, at the instance of the respondent, to ascertain the sum due. The respondent is not precluded from relying on the 3 & 4 Will. IV. c. 27, s. 42, in the office, as a bar to more than six years' arrears of interest, though he did not rely on it in showing cause against the conditional order, and the sum stated in the order was much more than the principal money and six years' interest thereon. *Costello v. Burke.*

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4. The Court having, at the instance of the respondent, restrained the petitioner from proceeding on the order for the receiver, the respondent undertaking to pay him a certain annual sum; the petitioner is not entitled to appropriate the money paid him, pursuant to that order, to the discharge of interest which had accrued due more than six years before the making of the conditional order. *Ibid.*

5. In 1804 *F.* instituted a suit in equity to recover damages for

breach of covenant out of the real and personal estate of *B.*, the covenantor, and obtained a decree in 1820, directing a reference, or an issue, to ascertain the amount of the damages; but, instead of prosecuting the decree, *F.* brought an action on the covenant, and in 1822 obtained judgment therein. Shortly afterwards *F.* died. In 1841 administration of his effects was obtained, and in the same year, his personal representative filed a bill of revivor; but, without obtaining an order to revive, he, in the same year, filed a charge on foot of his demand, under an order of reference of 1841, made in another cause instituted in 1776, to carry the trusts of the will of *B.* into execution; in which cause a sum of money had been impounded to meet, amongst others, the claim of *F.*; the reference being to ascertain what were the charges affecting the fund:—*Held*, that the case was not within the 3 & 4 Will. IV. c. 27, and that the demand of *B.* was not barred. *Birmingham v. Burke.*

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LIS PENDENS.

1. A suit by a judgment creditor for an account of the real and personal estate of his debtor and payment of his debts, is a sufficient *lis pendens* to affect an incumbrance on the life estate of a defaulting executor in lands, the fee of which was subject to the judgment, with notice of an equity to have the life estate ap-

- plied to answer the default of the executor. *Jennings v. Bond*. 720
2. When the question is not between a registered and unregistered deed, notice by *lis pendens* is not affected by the registration of the title deed of the person sought to be affected thereby. *Ibid*.
3. The 7 & 8 Vic. c. 93, s. 10, which requires that a *lis pendens* shall be registered to affect a purchaser, does not apply to a purchase made before the passing of the Act. *Ibid*.

LUNACY AND LUNATICS.

See EVIDENCE.

PRACTICE, 4.

A deed was executed by a person who at the time was insane upon particular subjects: *Quære*, whether the jury, being satisfied of the existence of the morbid feeling at the time of execution of the deed, though not then called into activity, are at liberty to say that, as the lunatic was reasonable in all other respects, the deed was valid?

Quære, if a man is partially insane, and that partial insanity is never removed from his mind, is he capable of entering into solemn acts which he would not have entered into, if the subject of his delusion had been touched upon?

It is incumbent on a party supporting a deed executed by a lunatic during the time covered by the inquisition, to show clearly that it was executed during a lucid interval.

If a man has been insane and

afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to show that he was not as sound a man in his judgment as before his insanity. All that the law requires is, that a man should have possession of his reason, so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect. *Creagh v. Blood*. 509

MARRIAGE.

See DEED, 6, 8.

MASTER.

See PRACTICE, 2.

MERGER.

See BANKRUPTCY.

MISJOINDER OF CO-PLAINTIFFS.

See PLEADING, 3.

MARRIAGE ARTICLES.

1. By marriage articles the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime, contrary to the true intent and meaning of the articles. There was no issue of the marriage, and the husband died, leaving his

wife surviving. She is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance. *Hamilton v. Jackson.* 295

2. By articles executed in consideration of marriage and the fortune of the wife, it was agreed that the trustees of a money fund after the decease of the husband, should pay the residue of the interest and also the principal sum (subject to an annuity by way of jointure for the wife) to the issue of the marriage, in such shares and proportions, or to any one or more of them in exclusion of the others of them, as the husband should by deed or will appoint; and, in default of appointment, to all the issue in equal shares; to such of said issue as should be sons at 21, and to such of them as should be daughters at 21 or marriage: and that power should be given to pay, towards the advancement of any of said issue, any sum not exceeding one-half of the principal sum belonging to such child respectively; and in case there should be no issue, or all such issue should die in the lifetime of the husband, then, that the entire of the trust funds subject to the jointure, should vest and be assigned, and go to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. And it was further agreed, that a regular deed of set-

tlement should be executed, which should contain the several clauses and covenants in such cases usual and proper:—*Held*, 1. That the word “issue” in the articles was to be read “children.” 2. That the settlement ought to contain clauses vesting the shares of the sons in them at 21, and of the daughters, in them at 21, or marriage; and also clauses of survivorship and accruer of the shares of sons dying under 21, and of daughters dying under that age without having been married, in favour of the surviving or other children. 3. That the husband was entitled to the fund, either in the event of his surviving all his children, or of no child attaining a vested interest therein; and that the settlement ought to contain clauses accordingly. *Roche v. Roche.*

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MORTGAGOR AND MORTGAGEE.

See SALVAGE ADVANCES.

1. Advances made by a mortgagee, for the preservation of the estate (*ex gr.* head rent paid by him), follow the nature of the mortgage security; and if the mortgagee is not entitled to foreclose the mortgage until after the decease of the mortgagor, neither is he entitled, during the life of the mortgagor, to a sale of the estate for payment of such advances; but, if necessary, a receiver will be appointed to keep down the interest on the mortgage

debt and advances. *Burrows v. Molloy.* 521

2. The proviso for redemption in a mortgage of a leasehold for years, was, that upon payment of the principal on a day mentioned, and interest thereon, and the head rents in the mean time, the deed should be void. By deed of equal date, reciting that the agreement of the parties was, that the principal should not be called in until after the decease of the mortgagor, but that by mistake it was stated in the mortgage deed, that the principal might be called in on a day certain, the mortgagee covenanted that the principal money should not be called in until after the decease of the mortgagor, anything in the deed of mortgage to the contrary notwithstanding:—*Held*, that the mortgagee could not foreclose the mortgage during the life of the mortgagor, though the interest was in arrear and the mortgagor had not paid the head rent.

Ibid.

MULTIFARIOUSNESS.

See PLEADING, 1.

RENT-CHARGE.

NOTICE.

See COSTS, 7.

LIS PENDENS.

VENDOR AND PURCHASER.

By marriage settlement a rent-charge was granted to trustees and their heirs, upon trusts for the husband and the issue of the marriage; and

the lands were granted to other trustees for a term of years, upon trust to secure the rent-charge. One of the trustees of the rent-charge admitted that, before the execution of the settlement, he had notice of a prior incumbrance on the lands; and one of the trustees of the term denied that he had such notice. No evidence of notice was given:—*Held*, that notice to the trustee of the rent-charge was sufficient; but, there being no issue of the marriage *in esse*, the Court would not declare that their interests were bound by the prior incumbrance, but declared that the trustee had notice of it. *Wise v. Wise.* 403

OCCUPANCY.

See LEASE PUR AUTRE VIE.

PARENT AND CHILD.

See APPOINTMENT, 1, 2.

PAROL TRUST.

See TRUST.

PARTIAL INSANITY.

See LUNACY AND LUNATICS.

PARTITION.

See ARBITRATION.

PARTNERSHIP.

See PUBLIC COMPANY.

PAYMENT.

See SATISFACTION.

PENAL STATUTE.

See INJUNCTION.

PETITION.

See PRACTICE, 1.

PETTY BAG.

See SCIRE FACIAS.

PLEADING.

See COSTS, 4, 6.

GENERAL ORDERS, 1, 3.

INJUNCTION.

TRUSTEE AND CESTUI QUE

TRUST, 2.

1. *Semble*, that if a demurrer for multifariousness cannot be taken to a bill because it contains a charge of collusion between the several defendants, and the plaintiff fail to prove the collusion, the objection may be taken at the hearing. *Nixon v. Robinson.* 4
2. Where the Provisional Assignee of the Insolvent Court is a party defendant to a suit, and dies, the new Provisional Assignee may be made a party by bill of revivor merely. *O'Brien v. Mahon.* 201
3. Where two persons join as co-plaintiffs in respect of separate and distinct titles, neither of them having any interest in the title sought to be enforced by the other, and it appears that one of them has no title; the bill will be dismissed generally without prejudice to the other co-plaintiff enforcing his title in a separate suit. *Richardson v. Nixon.* 250
4. A purchase for valuable consideration without notice is a defence as

well against a legal as an equitable title. *Joyce v. De Moleyns.* 374

5. Trustees to preserve contingent remainders are not necessary parties to a suit to raise a charge affecting the inheritance. *Stewart v. Marquis of Donegal.* 635
6. Conversations containing admissions which go to the gist of the case ought to be put in issue by the bill. *Donohoe v. Conrahy.* 688
7. Upon a bill to carry a decree into execution, the Court will assume that the law of the decree is correct upon a matter then submitted to the judgment of the Court. *Daly v. Daly.* 752

POLICY OF ASSURANCE.

See DEED, 9.

PORCION.

See SATISFACTION.

POWER.

See APPOINTMENT.

DEED, 4, 6, 7, 10.

TRUSTEE, 3, 5.

1. *C.* having power to appoint a money fund to all, and every, or any child or children of her's, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment to be equally divided between them, by her will appointed different sums to several of her children; and reciting that her daughter, *M.*, had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she de-

clared that she deemed her patrimony in that case sufficient for her maintenance; but in case *M.* should change her mind and return to her family and friends, she bequeathed to trustees 1000*l.* in trust for *M.* to receive the interest of the same during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent or not leaving any issue, the 1000*l.* to be divided amongst her three daughters therein named: and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned:—*Held*, 1, that the power authorized an appointment to take effect upon the happening of a contingency; 2, that the interest which should accrue on the 1000*l.*, while the contingency was undetermined, passed under the residuary bequest in the will. *Caulfield v. Maguire*.

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2. *A.* and *B.* having a joint power of revocation and new appointment, by deed and fine reciting an agreement that *A.* should, in manner thereafter mentioned, secure to *B.* payment, within twelve months, of the principal sum of 12,000*l.* and the interest of a sum of 8000*l.*, irrevocably revoked the uses of a former settlement, and appointed the lands to trustees for a term of 550 years, upon trust, as soon as conveniently might be (but with the consent in writing of *A.*, if dur-

ing or within twelve months from the date of the deed, and afterwards of their own authority), to raise 20,000*l.* by sale or mortgage; provided that if the 20,000*l.* thereinbefore directed to be raised within twelve months, should not, within or at the expiration of that time, be raised, or if *A.* should die before the 20,000*l.* should be actually raised, then the deed, and every clause and thing therein, should be void; and the fine should enure to confirm the several estates and interests in the lands, subsisting immediately before the execution of the deed of revocation:—*Held*, upon the whole deed, that the money was to be raised within twelve months, and if it were not raised within that time, or *A.* should die before it was raised, and within the twelve months, the deed should be void.

The money not having been raised within the time:—*Held*, that the old uses, including the power of revocation, revived. *Lord Langford v. Little*. 613

3. The ultimate limitation of the use in the former settlement was to *A.* in fee. After the expiration of the twelve months, *A.* made his will, devising all his estates; and after the execution of the will, *A.* and *B.* revoked the uses of the settlement, and limited the use to *A.* in fee. The deed revoking the uses of the settlement operates as a revocation of the will. *Ibid*.
4. The will was made before, and the

deed of revocation after the 1 Vic. c. 26:—*Held*, that the reversion in fee, of which the devisor was seised at the time of his decease, did not pass by the will. *Lord Langford v. Little*. 613

5. The 19 & 20 Geo. III. c. 32, incorporated the undertakers of the Lagan Navigation, and enacted that it should be lawful for every subscriber towards completing the navigation, and through whose hands it should pass, to charge his real estate for the use of his younger children, with the payment of such sums of money and other interest which he might have in the joint stock of the company, as he should assign or bequeath to his *heir*, any settlement to the contrary notwithstanding. Under a settlement of 1761, *A.* was tenant for life of lands through which the navigation passed, with powers of jointuring and leasing, with remainder to *B.*, his eldest son, in tail. *A.* was a subscriber to the undertaking by reason of advances made by him before and after May, 1792. In 1791, *A.* and *B.* suffered recoveries and declared the uses to be to *A.* for life; and after his decease, as *A.* and *B.* should jointly appoint: and until such joint appointment, *A.* was to be at liberty to exercise all powers given to him by the settlement of 1761. In 1792 *A.* and *B.* agreed to resettle the estates, for valuable considerations moving from each of them; and by deed of the 17th of May, 1792, *A.* and *B.* appointed the lands after

the decease of *A.*, and subject and without prejudice to his life estate, and to all powers and authorities then vested in or belonging to him, whether appendant or in gross or otherwise, to *Z.* in fee, in order that he might join in the intended resettlement of the estates; and by another deed of the 19th of May, 1792, *A.*, *B.*, and *Z.*, reciting *A.*'s powers under the settlement of 1761, and the intention of the parties to resettle the estates, subject to the powers thereafter mentioned, conveyed the estates to *A.* for life; remainder to *B.* for life; remainder to his first and other sons in tail: and new powers of leasing and jointuring were given to *A.* This deed did not contain any saving of the former powers of *A.* under the settlement of 1761 or otherwise, and no allusion was made in it to the power of charging under the 19 & 20 Geo. III. c. 32. *A.*, by his will, reciting the Act, devised all his shares in the Company to *B.*, his heirs, executors, &c., and charged the settled lands with 30,000*l.* for his only younger child:—*Held*, 1. That the power to charge given by the Act was not destroyed by the recovery of 1791, it not being the intention of the parties to the recovery that the power should be destroyed thereby. 2. That it was destroyed, *quoad* advances made before the 19th of May, 1792, by the settlement of that date, which amounted to a contract by *A.* not to exercise the power as to

advances then made; but that it existed as to subsequent advances.

3. That "heir" in the Act meant heir to the settled estates, and included, as far as the law would permit, all persons claiming in succession under the settlement; and that the power given by the Act was well executed by the will of *A.*; for that the bequest of the shares to *B.*, his heirs, executors, &c., thereby made, enured, according to the title, for the benefit of the remainder-men under the settlement.

4. The younger child of *A.* who was also his executor, having without fraud consented, *qua* executor, that the Company should issue new debentures to *B.* in lieu of some which had been granted to *A.*, and were lost by the executor:—*Held*, that the charge on the estate was not affected thereby. *Stewart v. the Marquis of Donegal.* 636

POWER TO LEASE.

1. An estate was limited to *L.* for life, with power to lease at the best rent. *L.* demised the lands to a trustee for a term of years, to secure an annuity to *G.*, and covenanted to exercise his power of leasing, and afterwards was discharged as an insolvent. *L.* and *G.* agreed to demise the lands, and accordingly executed the lease:—*Held*, that the Provisional Assignee was bound to execute the lease, as he took the estate subject to all the equities and liabilities to which it was subject in the hands of the insolvent,

and the exercise of the power was for the benefit of the creditors.

Dyas v. Cruise. 460

2. Tenant for life, with power to lease at the best rent, agrees to make a demise for a term warranted by the power, but at a rent which afterwards appears not to be the best rent. There being no fraud in the transaction, the Court will decree a partial performance of the agreement, and direct the tenant for life to execute the agreement as far as his estate enables him to do so.

Ibid.

3. Under a power to lease at the best rent, the highest rent need not be reserved. The question,—what is the test that the best rent has been reserved? and the cases on the subject,—considered. *Ibid.*

PRACTICE.

See COSTS, 5.

DECREE.

DEVISAVIT VEL NON.

GENERAL ORDERS, 1, 2, 3.

PLEADING, 2.

RECEIVER, 1, 2, 3.

SCIRE FACIAS.

1. The Court will not make an order on a petition presented under an Act of Parliament, unless it be entitled in the matter of the proper Act. *In re French.* 243
2. The Master may, in the exercise of a sound discretion, refuse to declare the highest bidder to be tenant of lands set up to be let under the Court: but where the Master did

not declare the highest bidder to be the tenant, the Court, upon the application of the bidder, reviewed the circumstances of the case, and declared him to be tenant at the rent offered by him. *In re Costello*. 244

3. The Court will not, in a suit to carry the trusts of a will into execution, merely declare the rights of the parties, and then leave them to act on that declaration out of Court.

Brown v. Martyn. 333

4. Mode of proceeding by the committee to obtain possession of the person of a lunatic, who, before inquisition found, had been committed to custody under the 1 Vic. c. 27. *In re Flanagan*. 343

5. By suffering the bill to be taken as confessed against him, the defendant admits the facts stated in it; but the plaintiff must shew that the facts so admitted entitle him to relief. *Simmonds v. Palles*. 489

PRINCIPAL AND AGENT.

1. If in a transaction between principal and agent, it appears that there has been any underhand dealing by the agent, *ex. gr.*, that he has purchased the estate of the principal in the name of another person, instead of his own,—however fair the transaction may be in other respects, it has no validity in a Court of Equity.

To set aside a sale from a principal to his agent, it is not necessary to show that it was made at an under value.

An agent may purchase from his principal, provided he deals with him at arm's-length, and after a full disclosure of all that he knows with respect to the property. *Murphy v. O'Shea*. 422

2. An agent to let lands is bound to let them to the best advantage: but upon the mere ground of under-value a *bonâ fide* letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if that agent has acted fairly and honestly.

An authority to let lands may be inferred from the letters and acts of the party. *Dyas v. Cruise*. 460

PRINCIPAL AND SURETY.

See COSTS, 2.

- A.* as principal, and *B.* as surety, joined in granting an annuity for the life of *C.*; and *A.* assigned to trustees a policy of insurance upon his own life, upon trust to permit *C.*, after the death of *A.*, out of the money insured, or the interest thereof, to receive the annuity. And *A.* and *B.* executed their joint and several bond conditioned to secure the punctual payment of the annuity. The executors of *A.* received the amount of the policy, and invested it upon Government securities. The executor of *B.* was compelled to pay *C.* an arrear of the annuity:—*Held*, that, as against the general assets of *A.*, the executor of *B.* was not entitled to inte-

rest on the money so paid by him : but that he was entitled, as against the sum insured, and the interest thereon, to be put in the same situation as if it had been duly applied in payment of the annuity, and therefore to be repaid thereof the money advanced by him, with interest. *Caulfield v. Maguire*.

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PRIORITY.

See DEED, 10.

MORTGAGOR AND MORTGAGEE, 1.

RECEIVER, 3.

SALVAGE ADVANCES.

PRO CONFESSO.

See PRACTICE, 5.

PROVISIONAL ASSIGNEE.

See PLEADING, 2.

POWER TO LEASE, 1.

REGISTRY ACTS.

PUBLIC COMPANY.

1. A joint stock banking company stopped payment. Certain of the shareholders who afterwards obtained the management of the affairs of the company, contributed, in proportion to the number of shares held by them, to a common fund, which was to be applied, for the protection of the contributors, in payment of the debts of the bank : and they called on all the shareholders to contribute to this fund. Some did not ; and, for the purpose of carrying out the object of the contributors, an ar-

rangement was entered into between them and a creditor of the company, that the creditor should obtain a judgment against the company, to be used against such of the shareholders as the contributors should select. Accordingly, a creditor obtained a judgment by confession against the public officer ; and, at the instance of the contributors, issued a *scire facias* against the plaintiff, who had been a shareholder, but, before the contract upon which the judgment had been obtained was entered into, had, by informal transfers, assigned his shares to a trustee for the company. This transaction is fraudulent, in the view of a Court of Equity ; and the creditor was restrained proceeding at law against the plaintiff. *Taylor v. Hughes*. 24

2. The 6 Geo. IV. c. 42, does not prevent or interfere with the *bonâ fide* retirement from the co-partnership of any member ; and the company may buy out a partner notwithstanding the Act. *Ibid*.
3. Where a transfer of shares is made by a member to the company, the latter may, as between the parties to the transfer, dispense with the machinery which the Legislature has rendered necessary to transfers in general ; and the company cannot afterwards, as between themselves and the partner with whom they contracted, impeach the transaction. *Ibid*.
4. *Semble*,—1. That a person who, *de facto*, is a partner, and who appears

to be so on the books of the co-partnership, and whose name is registered as such, cannot discharge himself of his liability to creditors by showing that the transfer to him was informally executed. 2. That the registry of the name of the plaintiff, after the bank had stopped payment, as a partner "concerned in the co-partnership, as the same appears on the books of the company," was not authorized by the Act, even at law; where he had ceased to appear as a partner on the books for seven years, and his name had been withdrawn from the register, and no new contract had been entered into with him, but entries merely had been made that the transfers by him were invalid. *Taylor v. Hughes.* 24

PURCHASER WITHOUT NOTICE.

See LEGACY.

PLEADING, 4.

VENDOR AND PURCHASER.

RECEIVER.

See LIMITATIONS (STATUTES OF), 3, 4.
MORTGAGOR AND MORTGAGEE, 1.

1. The Court would not, at the instance of a lay impropriator, appoint a receiver for payment of tithe rent-charge, upon an affidavit merely stating that he was the lay impropriator of the parish: when it appeared that his title to the tithes had been and still was con-

tested by the parishioners; and the only payment he had obtained out of the lands of the respondent was by the hands of a receiver of the Court appointed in the suit of a third person. *Greville v. Fleming.* 335

2. Lessee for years demised the lands for his entire term, with the usual powers of distress and entry, and the rent having become in arrear, he filed a bill for a receiver, and moved upon the answer accordingly. The application was refused, the Court doubting whether the bill could be sustained, as the plaintiff had a remedy at law. *Cremen v. Hawkes.* 674
3. A motion for a receiver will not be granted upon an equity appearing in the answer, which is not relied on in the bill. *Ibid.*
4. A receiver was appointed in a cause instituted by an annuitant, whose annuity affected the life estate, and was extended to the matter of a prior judgment creditor, whose judgment affected the inheritance. The rent received must be applied according to the legal right of the parties; and the Court cannot, against the consent of the judgment-creditor, apply the rents, first in payment of the interest on the judgment debt, and then of the demand on the life estate. *Corbett v. Mahon.* 671

RECOGNIZANCE.

See SCIRE FACIAS.

RECOVERY.

See POWER, 5.

REGISTRY ACT.

See LIS PENDENS, 2, 3.

PUBLIC COMPANY.

A. being entitled to lands in Ireland, was discharged in England as an insolvent debtor, under the 1 Geo. IV. c. 119. The assignment of all his estate and effects to the Provisional Assignee was filed in the Insolvent Court, but was not registered. The sub-assignment to the general assignees was registered. Afterwards *A.*, by deed duly registered, conveyed his Irish estates, in mortgage, to *B.*, who had no notice of the insolvency. The title of the mortgagee is to be preferred to that of the assignees of the insolvent. *Battersby v. Rochfort.* 431

RENEWAL.

See LEASE FOR LIVES RENEWABLE, 1, 2.

RENT.

See RECEIVER, 2, 3.

SOLICITOR AND CLIENT, 1.

RENT-CHARGE.

See GENERAL ORDERS, 3.

LIMITATIONS (STATUTES OF), 1, 2.
NOTICE.

By marriage articles it was covenanted, that a lease for lives and a term for years, the property of the intended husband, and also a lease for lives renewable for ever,

and a term for years, the property of the intended wife (which were subject to a mortgage), should be conveyed to trustees; and that the intended husband should have power to give, devise and bequeath the said lands, or such of them as he should then have in his power, to and amongst the issue of the marriage, in such manner and form as he should by deed or will appoint; and in default of appointment, then that the intended wife should have the like power. The mortgaged lands were afterwards sold under a decree in a foreclosure suit, for more than the sum due under the decree. Subsequently a deed of conveyance and appointment was executed, which purported to convey all the lands, as if they were still existing interests, to a trustee, to the use and intent, that *E.* (a daughter of the marriage), her heirs and assigns, should, during the respective terms for which the lands were holden, have and receive a rent-charge of 36*l.*, and that *J.* (another daughter), her heirs and assigns, should, in like manner, have and receive a like rent-charge of 36*l.*, the same to be issuing out of and charged upon all and singular the lands and premises thereby conveyed; and that *E.* and *J.*, and their respective heirs and assigns, should have powers of distress and entry for the recovery thereof. The surplus purchase-money was applied, without the priority of the annuitants, in obtaining a renewal of the husband's term for

years. The husband's freehold for lives determined by the deaths of the *cestui que vies*: and afterwards *E.* died intestate; and her administrator conveyed her annuity to *R.*, who, together with *J.*, filed a bill to raise the amount of their respective annuities.

Held,—1. That the rents issued wholly out of the freehold; with, nevertheless, a right to distrain on the leaseholds for years.

2. That the surplus of the purchase-money was impressed with the continuing character of real estate, as far as it was the produce of the freehold for lives; and that that character could not be subsequently varied, as against the annuitants, without their consent.

3. That upon the decease of *E.*, intestate, her rent-charge descended upon her heir at law; and that *R.* was not entitled to it.

4. That where two persons join as co-plaintiffs in respect of separate and distinct titles, neither of them having any interest in the title sought to be enforced by the other, and it appears that one of them has no title, the bill will be dismissed generally, without prejudice to the other co-plaintiff enforcing his title in a separate suit.

5. That the bill was not multifarious. *Richardson v. Nixon*. 250

Seemle,—That if a rent be granted to *A.* and his heirs, to be issuing out of a freehold for lives and a term for years, and the freehold afterwards determines, the rent-charge

does not alter its character and become a chattel interest. *Ibid*.

REVIVOR.

See COSTS, 4.

PLEADING, 2.

REVOCATION.

See POWER, 2, 3.

WILL, 5.

SALVAGE ADVANCES.

See MORTGAGOR AND MORTGAGEE, 1.

The devisee of a leasehold estate for lives having suffered an arrear of rent to become due, the landlord brought an ejectment. A third person, at the request of the devisee, advanced money for the purpose of paying the rent, and it was applied accordingly, and the devisee mortgaged the lands to secure the repayment of it. The mortgagee is not entitled to priority over the judgment creditors of the devisor. *Angell v. Bryan*. 763

SATISFACTION.

1. A sum of 1000*l.* was, by deed of 1805, vested in *A.*, in trust for his daughter, *M. G.*, until she attained the age of twenty-five years, or married; and after attaining that age, or day of marriage, to permit *M. G.* to receive the interest during her life; and after her decease, for her issue, as she should appoint; and, in default of appointment, equally; but in case she should die previous to

25, or day of marriage, or without issue, then over to the other children of *A.* On the marriage of *M. G., A.*, by settlement of 1824, vested in trustees securities for money exceeding 1000*l.*, upon trust for the separate use of *M. G.* for her life; and, after her decease, for the use of the children of the marriage, as the intended husband should appoint; and, in default of appointment, equally; and, in default of such issue, for the intended husband, his executors, &c. This settlement did not refer to the deed of 1805:—*Held*, that the provision made for *M. G.*, by the settlement of 1824, was a satisfaction of her claims under the deed of 1805, though it did not appear that the husband was aware of his wife's claim thereunder. *Hayes v. Garvey.*

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2. A provision by a father, on the marriage of his daughter, of a greater sum than he owes her, is, in general, to be deemed a payment of the debt; and it is not necessary that there should be an express stipulation to that effect, or to show that the husband knew of the debt.

Ibid.

SCIRE FACIAS.

1. A *scire facias* on a recognizance set forth, that on, &c. [at Ballinasloe, in the county of Galway], *M. F.* and two others, of, &c., in the county of Galway, came before *J. R.* [who then and there was] one

of the Masters, &c. [as by the said recognizance, of record and enrolled, &c., may appear]. In the record of the recognizance, the words within the brackets were omitted; but at the foot of the recognizance was this note, signed by the Master: "Taken and acknowledged before me, at Ballinasloe, in the county of Galway aforesaid." Upon *nul tiel record* pleaded:—*Held*, that there was a variance. *Regina v. Lynch.* 108

2. The note at foot is not part of the recognizance. *Ibid.*
3. A case depending at the petty-bag side of the Court may be heard and determined out of Term. *Ibid.*

SETTLEMENT.

See APPOINTMENT, 1.

HUSBAND AND WIFE.

MARRIAGE ARTICLES.

SOLICITOR.

See GUARDIAN.

SOLICITOR AND CLIENT.

1. Testator devised his freehold lands to his wife and children equally; and appointed her his trustee. Under her marriage settlement, the wife was entitled to a sum of 500*l.*, charged on the land, and payable on the death of the testator. She entered into receipt of the rents as devisee and trustee in the will:—*Held*, that, as against a subsequent judgment creditor, with whose consent she entered, and who acted

gratuitously as her solicitor, in the matter of the trusts of the will, she was chargeable only with such parts of the rents as she had received and applied to her own use. *Boyd v. Murdock.* 203

2. The solicitor for any of the persons who exercise a control over the minors' estate, will not be appointed the guardian of their persons. *In re Johnstons, Minors.* 222

3. A solicitor is not at liberty to deal with his client for a security for a debt due to him by a third person, without giving to his client all the information he possesses connected with his demand, and the nature of the security. Therefore, where a solicitor took from his client a security on a sum of money charged upon the estate of the principal debtor, for the recovery of which the client was then prosecuting a suit in Equity, and did not disclose to him the circumstances connected with that estate, and particularly that he (the solicitor) had other demands affecting it, a bill to enforce that security was dismissed with costs. *Higgins v. Joyce.* 282

4. No one can give a lien on deeds to a solicitor of a higher nature than the interest he himself has in the deeds. *Molesworth v. Robbins.* 358
5. By settlement of 1780, *D.*, seised *quasi* in fee, charged the lands with 2500*l.* for his children. On his death, the inheritance descended upon his son, *R.*, who was also entitled to a portion of the charge.

R. retained *M.* as his solicitor; who, in the lifetime of *R.* instituted a suit in his name to raise the charge. That suit having abated by the death of *R.*, *M.*, as the administrator of *R.*, and the other persons entitled to the residue of the charge, instituted another suit as co-plaintiffs, to raise its amount; and *M.*, as solicitor, conducted that suit for the co-plaintiffs. In the course of his professional employment, the title-deeds relating to the estate and the charge came into his possession. A receiver was appointed in the suit, but no decree was obtained therein. The lands were afterwards sold under a decree in the suit of a *puise* judgment creditor of *D.*; and *M.* was ordered to bring in and lodge the title-deeds, without prejudice to his lien: which he did:—*Held*, that *R.*, as owner of the inheritance, could not give *M.* a lien for costs on the title-deeds of the estate, as against the persons entitled to the charge. That *R.*, as owner of a portion of the charge could not give *M.* a lien on the deed creating the charge, as that deed belonged to him in common with the other persons entitled to the charge, and not to him solely. That the lien of *M.* on the deeds evidencing the title of his clients to the charge, was not transferred to the sums decreed to them in respect thereof. *Molesworth v. Robbins.* 358

SPECIAL OCCUPANT.

See LEASE PUR AUTRE VIE.

SPECIFIC PERFORMANCE.

See MARRIAGE ARTICLES, 2.

POWER TO LEASE, 2.

STATUTES (CONSTRUCTION OF).

19 & 20 Geo. III. c. 30.	571
19 & 20 Geo. III. c. 32.	636
26 Geo. III. c. 57.	123
6 Geo. IV. c. 42.	24
3 & 4 Will. IV. c. 27, s. 25.	182
3 & 4 Will. IV. c. 27, s. 40. 303,	689
3 & 4 Will. IV. c. 27, s. 42.	665
3 & 4 Will. IV. c. 55.	674
1 Vic. c. 26.	613
1 Vic. c. 27.	343
7 & 8 Vic. c. 93, s. 10.	720

SURETY.

See COSTS, 2.

PRINCIPAL and SURETY.

SURRENDER.

See VENDOR and PURCHASER.

The Court has no authority to set up a lease, which by the *bonâ fide* exercise of the power vested by law in a tenant for life to grant a new lease, has, by the doctrine of surrender by operation of law, been determined; there being no fraud or collusion, or other circumstance to justify the interference of the Court. *Nixon v. Robinson.* 4

SURVIVORSHIP.

See JUDGMENT.

MARRIAGE ARTICLES, 2.

TENANT FOR LIFE AND REMAINDER-MAN.

See VENDOR and PURCHASER.

1. Tenant in fee borrowed money; to secure the repayment whereof, with interest, he confessed a judgment in double the amount, and put his creditor into the receipt of a fee-farm rent, which was equal in amount to the annual interest: and afterwards devised all his estates to *A.* for life; remainder to *B.* for life; remainder to the first and other sons of *B.*, in tail. *A.* died in 1802; the full amount of the judgment being then due to the creditor, who had not been paid interest since 1786. *B.* died in 1824, never having received any part of the fee-farm rent; but his executors were paid twenty-one and a half years' arrears of the rent. *B.* having, in 1824, paid off the judgment, and taken an assignment of it to a trustee for himself:—*Held*, that his executors were not at liberty to retain, as against the remainder-man, the arrears of the fee-farm rent received by them, and to leave the arrears of the interest a charge upon the estate: particularly as *B.*, in 1803 and 1821, became a party to family settlements, in which the estate was dealt with as if the fee-farm rent had been applied in payment of the interest; and benefits were given to him by those settlements. *Caulfield v. Maguire.* 141
2. Where an estate, subject to a charge bearing interest, is limited to seve-

ral persons in succession, as tenants for life, the conclusion to be drawn from the authorities appears to be, that each tenant for life is liable only for the interest for his own time, but that, to liquidate the arrears during his own time, he must furnish all the rents, if necessary, during the whole of his life. *Caulfield v. Maguire*.

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TENANTRY ACT.

See LEASE FOR LIVES RENEWABLE.

THEATRE.

See INJUNCTION.

TITHE RENT-CHARGE.

See RECEIVER, 1.

TRUST.

See DEED, 8, 10.

LIMITATIONS (STATUTES OF),
1, 2.

Circumstances under which a parol trust of real estate will be enforced
Donohue v. Conrahy. 688

TRUSTEE.

(1 WILL. IV. c. 60.)

See COSTS, 3.

GENERAL ORDERS, 1.

NOTICE.

PLEADING, 5.

Conveyance by Infant Trustee.

1. A petition under the 1 Will. IV. c. 60, stated, that in 1803 the testator devised real estate to a trustee, to pay debts; and after payment thereof, in trust for the petitioner ;

that he died in 1824, and thereupon the petitioner entered: that many years ago, petitioner and the trustee sold part of the estate and paid all the debts; that the trustee had died, and that his heir was a minor; and it prayed a conveyance of the legal estate. The Court directed inquiries whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will. *In re Catherine Barry*. 1

Appointment of.

2. The 1 Will. IV. c. 60, was not intended to sanction a trustee resigning his trust rather than do an act which he deems improper. *Pepper v. Tuckey*. 59
3. A trustee in a marriage settlement refused to join in lending the trust-money, because he disapproved of the security. The wife, pursuant to a power for the purpose, removed him, and appointed a new trustee in his place; and the husband and wife then presented a petition under the Act, to compel the old trustee to transfer the funds to the new trustee. The Court refused the application. *Ibid*.
4. Stock was invested in the names of two persons, upon trust, as was alleged, for the petitioners. The only evidence of the trust was the statements in the petition and verifying affidavits, and a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some place unknown, out of the jurisdiction, a

petition was presented, praying that the stock might be transferred to the petitioners; but the Court refused to make the order in his absence, though it was stated that he declined to act, and the other trustee submitted to act as the Court should direct. *In re Dunbar*. 120

5. By marriage settlement a judgment was vested in trustees; and it was declared, that if the wife should, with the consent of her husband, think it advisable to call in the sum secured thereby, the trustees were to permit her to use her discretion, as to the investment of same. One trustee died, and the other was out of the jurisdiction. The wife, with the consent of her husband, called in the money; and she and her husband assigned the judgment to a third person, who advanced the money; but the surviving trustee refused to execute the assignment, and desired to be discharged from the trusts. The Court, thinking the real object of the parties was, not to continue the money in settlement, but, under colour of the power, to get it out of settlement, refused to appoint new trustees. *In re Molony*. 391

TRUSTEE AND CESTUI QUE TRUST.

See LIMITATIONS (STATUTES OF),
1, 2.

1. A money-fund belonging to the wife, was vested in trustees, upon trust to pay the interest to the hus-

band for his life, or until he should take the benefit of any Act for the relief of Insolvent Debtors: and after his decease, or obtaining the benefit of such Act, upon trust to pay the interest to the wife for her life; the same to be paid to her, in case of the insolvency of the husband, to her separate use: and after her decease, in trust for the issue. The trustees, at the instance of the wife, committed a breach of trust, by lending part of the trust-fund to the husband, who afterwards was discharged as an insolvent. Upon a bill by the wife and her children to make the trustees answerable for the breach of trust:—*Held*, that the contingent interest of the wife, for her separate use, was not bound to make good to the trustees the money advanced by them at her request.

Quære,—Whether her life interest, after the decease of her husband, was so bound.

Semble,—That if the discharge of the husband as an insolvent had been concerted with the privity of the wife, in order thereby to entitle her to a present interest in the trust-funds, and defeat the equity of the trustees against her husband, the trustees would be entitled to the same relief against her as against her husband. *Mara v. Manning*.

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2. *Palles* being indebted to *Ignatius Gould* in 3000*l.*, and *Sir George Gould*, the father of *Ignatius*, being indebted to *T. and H.* in 1000*l.*, for

recovery of which they had instituted an action at law against him, an arrangement was entered into, part of which was, that the action against Sir *George Goold* should be discontinued; and that *Palles* should pay the costs of it. And *Palles*, pursuant to the agreement, mortgaged his estate for 1400*l.* to a trustee, upon trust, *inter alia*, to secure to *Simmonds*, the attorney for *T.* and *H.* in the action, the costs of the plaintiffs in that action, to be paid as therein mentioned. *Simmonds*, though named in the declaration of trust, was not a party to the arrangement:—*Held*, that he was not entitled, as a *cestui que trust* under the deed, to institute a suit to carry the trusts of it into execution; and that, having done so, the objection might be taken by any party to the suit.

The principle of *Garrard v. Lord Lauderdale* (2 R. & M., 451), not to be extended.

Gibbs v. Glamis (11 Sim. 584) observed upon.

Distinction between voluntary settlements, where the object of the donor is bounty; and voluntary conveyances in trust to pay debts, to which the creditors are not parties. *Simmonds v. Palles*. 489

USURY.

Quære,—Whether a grant of an annuity for a term for years, which annuity, in the course of time, will repay the principal money and more

than the legal interest, is or is not usurious? *Kenny v. Lynch*. 319

VENDOR AND PURCHASER.

See ASSENT.

LEGACY.

PLEADING, 4.

PRINCIPAL AND AGENT, 1.

They who, with notice of his title, deal with a person entitled to a partial interest in an estate, are responsible for any dealing with the property which professes to incumber and embarrass the estate of the other persons claiming under the same instrument. They are not at liberty to deal with the estate so as to embarrass the other persons claiming under the same instrument. *Nixon v. Robinson*. 4

VESTING AND DIVESTING.

See DEED, 8.

MARRIAGE ARTICLES, 2.

VOLUNTARY CONVEYANCE.

See TRUSTEE AND CESTUI QUE TRUST, 2.

VOLUNTARY SETTLEMENT.

See TRUSTEE AND CESTUI QUE TRUST, 2.

WILL.

See LEASE PUR AUTRE VIE.

POWER, 1, 3, 4.

Construction of.

1. Testator directed that a certain debt of 25,000*l.* should be deemed

part of the residue of his personal estate; and he gave it, and all interest due and to grow due thereon, and the residue of his personal estate, to trustees, upon trust to collect, and from time to time invest same; and to pay the interest of one-third part thereof to each of his three children for their lives; and after their decease, respectively, to pay one-third part of the principal to their children. After making his will, the testator by deed released to his debtor all interest which should become due on the 25,000*l.* during his life; and he agreed to postpone the payment of the principal sum and the interest to accrue due thereon, until the end of three years next after his decease; and then to accept payment of the principal sum and the interest which should have accrued due thereon during the three years, by instalments; and that the 25,000*l.* should not bear interest after the expiration of the three years, so long as the instalments were regularly paid; but that if default should be made in payment of the instalments, the balance should be payable, with interest, until the instalments, with the interest, should be paid. By a codicil, the testator declared that the execution of this deed should not revoke, prejudice, or affect, his will:—*Held*, that the three years' interest did not form part of the capital of the residuary personal estate; and that the legatees for life

of the residue were entitled to it. *Caulfield v. Maguire.* 141

2. Testatrix gave a sum of money to her children who should be living at the time of her decease; and in case she should die without leaving any *such issue*, over: and, having a power to appoint to the children of *D.*, she gave 2000*l.* part of the fund, to the separate use of *A.* (one of the children); and if she died *without issue* by her then present husband, or any other she might thereafter take, the 2000*l.* to be divided amongst other objects of the power:—*Held*, that *A.* was absolutely entitled to the 2000*l.* *Ibid.* 141

3. Bequest of a sum of money to a trustee, in trust to pay to *A. N.* the interest, during her life, or until she married, for the support of her children, *W.* and *K.*; and in case of her death or marriage, to apply it to the use of her children; and on their coming to the age of 21, to divide the said sum between them. The children of *A. N.* born after the date of the will, and in the lifetime of the testator, do not take under this bequest.

Semble, a bequest to future illegitimate children is void: and there is no distinction between illegitimate children described as the children of a particular mother, without reference to their paternity, and those who are described as the children of a particular father. *In re Connor.*

4. Damages occasioned by a breach of a covenant for quiet enjoyment after the death of the covenantor, are a debt of his within the meaning of a devise in his will of his lands to trustees, upon trust, by sale or mortgage, to pay off and discharge all such just debts, of every kind, as he should happen to owe at his decease. *Birmingham v. Burke*. 699

5. Testator devised lands to the use of *H.* for life, without impeachment of waste; remainder to trustees during his life, to preserve, &c.; remainder, after his decease, to trustees for a term of 500 years, upon trust to raise portions for his younger children; remainder to his first and other sons in tail male; with several remainders over. By a codicil to his will, the testator revoked any bequest or devise to *H.* by any former will or codicil; and he devised the same lands to *H.* during his life, subject to an annuity which he had by deed charged thereon; remainder to *M.* during his life, to preserve, &c.; remainder to his first and other sons in tail; remainder to *M. D.* in fee: and he directed that this codicil should be taken as part of his will. *Semble*,—that the devise of the term of 500 years and the trusts thereof are revoked by the codicil.

Where a codicil contains an unbroken set of limitations, not reconcilable with those in the will,

and exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will. *Daly v. Daly*.

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Lost Will.

6. Upon the admission of the heir at law, that the will of the testator, which was lost, was duly executed and attested, and that thereby certain lands were devised to him, subject to a perpetual rent-charge; and upon evidence of the contents of the will, by two witnesses, who heard it read, but who could not state that it was executed and attested as by law required, further than that the person reading it read out the names of the testator and of certain persons as if they had executed and attested it; and upon proof of the payment of the rent-charge for thirty-five years up to the year before the filing of the bill, the Court declared that the lands were well charged with the annuity; and that the heir at law, and the persons deriving with notice under a settlement of the lands executed by him on the marriage of his son, and duly registered, and also the judgment creditors of the heir at law, were bound to give effect to the devise of the rent-charge. *Wise v. Wise*. 403

WITNESS.

See COMMISSION TO EXAMINE.





